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March 27, 2012

The Honorable Patrick Leahy  
Chairman  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
United States Senate  
Washington, DC 20510

The Honorable Charles Grassley  
Ranking Member  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
United States Senate  
Washington, DC 20510

## Re: "Hearing on the Special Counsel's Report on the Prosecution of Senator Ted Stevens"

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I write to thank you for scheduling a hearing on the Special Counsel's Report on the Prosecution of Senator Ted Stevens.

Nearly fifty years ago, in *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court recognized the constitutional importance of disclosing evidence that is favorable to a person accused of a crime. This decision established certain constitutional obligations for prosecutors during the pre-trial information sharing process known as "discovery." Unlike discovery in civil cases, where money as opposed to a person's freedom is at stake, criminal discovery is guided by prosecutors' exceedingly narrow reading of the requirement established in *Brady*. The failure to satisfy *Brady* obligations presents a compromised criminal justice system with an obvious risk of conviction of the innocent. In addition, it puts a significant financial burden on the accused. Yet, such failures occur all too often.

Former U.S. Senator Theodore "Ted" Stevens was prosecuted and convicted for criminal ethics violations, subsequently lost his re-election campaign, and, only shortly before his tragic passing, was exonerated after a whistleblower revealed that prosecutors withheld critical evidence of Senator Steven's innocence in

violation of his constitutional rights. From the start, his prosecution was permeated with government misconduct, making it impossible for the Senator to get a fair trial. As a result of numerous egregious violations committed by the experienced prosecutors in this case, the Senator's conviction was eventually dismissed. The investigation into the misconduct ordered by U.S. District Court Judge Emmet G. Sullivan that has now been concluded by Special Counsel Henry F. Schuelke, III will shed light on some of the types of discovery lapses that occur in criminal cases, whether due to misunderstanding, mistake, negligence, or even purposeful misconduct.

**Unfortunately, however, the type of conduct at issue in the criminal case against Senator Stevens is not a rare occurrence. By this letter, our association wishes to bring your attention to just a few stories of other people whose lives were dramatically harmed by the government's failure to comply with the constitutional demands of *Brady*.**

1. Companies facing criminal charges rarely go to trial, but Lindsey Manufacturing President and CEO Keith Lindsey and Vice-President and CFO Steve K. Lee took the risk and mounted an aggressive defense, on behalf of themselves and their company, that lifted the veil on numerous serious violations of their constitutional rights—all of which occurred *after* the Department of Justice issued new guidance to its prosecutors regarding their discovery obligations.<sup>1</sup> The Lindsey defendants were charged and ultimately convicted of multiple violations of the foreign bribery statute (FCPA). In a lengthy post-trial order, however, U.S. District Court Judge Howard Matz described this case as an “unusual and extreme picture of a prosecution gone awry,” threw out all the convictions, and banned the government from retrying the case. Occurring over a three-year period, the misconduct included, among other things, the intentional withholding of several grand jury transcripts evidencing the serious flaws in the investigation and substantially undercutting the government's case. Judge Matz characterized these transcripts as the “most complete and compelling evidence that the Government investigation had been tainted” and explained that without the transcripts, the defense was severely hamstrung. Despite all this, the Lindsey defendants were able to fight for their innocence and protect their rights. But the successful defense of these individuals and their company came at great cost.
2. Originally sentenced in 2003 to over ten years in prison, Edgar Rivas only regained his freedom after the Second Circuit Court of Appeals ruled that prosecutors violated his constitutional rights when they intentionally withheld a statement made by their main witness that actually supported Rivas' version of events.<sup>2</sup> A sailor on a foreign freighter, Rivas was charged and ultimately convicted of smuggling cocaine from Venezuela to New York despite his assertion that the drugs belonged to his shipmate. Prior to trial, the

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<sup>1</sup> *U.S. v. Aguilar, et al.*, Case No. CR-10-1031(A)-AHM (C.D.Cal. 2011).

<sup>2</sup> *United States v. Rivas*, 377 F.3d 195 (2<sup>nd</sup> Cir. 2004).

government's main witness, a fellow shipmate, admitted that he was the one who brought the drugs onto the ship, but the government hid that admission and it only came to light after the jury found Rivas guilty. The Second Circuit threw out Rivas' conviction, stating that the government's behavior was "totally unacceptable." Ultimately, the prosecutors declined to retry Rivas. But if the shipmate's admission had remained undisclosed, he would have spent over ten years in prison.

3. For the last four years, Dr. Ali Shaygan has been fighting to restore his professional reputation and to receive compensation for the damage the government inflicted upon him through a series of constitutional violations in their unsuccessful attempt to prosecute him for unlawfully dispensing prescriptions.<sup>3</sup> Dr. Shaygan came under investigation in 2007, was indicted on 141 counts in 2008, and his entire defense team was inappropriately investigated prior to trial. The jury ultimately acquitted the doctor on all counts, but not before, at the government's request, two informants secretly recorded conversations with the defense team and shared the recordings with the government. Although these two informants later testified against Dr. Shaygan, the prosecutors withheld all information, notes, and an informant agreement related to these recordings. The recordings only came to light because one informant accidentally mentioned it while testifying. U.S. District Judge Alan S. Gold described the events surrounding Dr. Shaygan's prosecution as "profoundly disturbing" and, in a sharply worded order imposing sanctions on the government, chastised the prosecutors for "knowingly and willfully disobeying" court orders, failing to comply with their discovery obligations, and engaging in "unethical behavior not befitting the role of a prosecutor." The government has since appealed that order and, despite proving his innocence at trial, Dr. Shaygan is still fighting to be made whole by our justice system.
  
4. Charged and convicted of unlawful possession of a gun, it took Anthony Washington nearly two years to clear his name after the government failed to disclose that the 911 caller, upon whom the government based its entire case, had been previously convicted of making a false report.<sup>4</sup> In this case, the only question for the jury was whether Washington possessed a gun. It was not until the first day of trial, however, that prosecutors revealed that the now-deceased 911 caller—who provided the only real evidence in this case—had been criminally convicted for lying. As U.S. District Court Judge Janet Bond Arterton explained, this "impeachment evidence was critical in this context" because the defense could have fully explored the caller's character and discredited the 911 tape had this information been disclosed as required. After nearly two years of waiting, Washington finally got the closure he deserved when Judge Arterton threw out his unconstitutionally-obtained conviction.

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<sup>3</sup> See *United States v. Shaygan*, 652 F.3d 1297 (11<sup>th</sup> Cir. 2011).

<sup>4</sup> *United States v. Washington*, 263 F.Supp.2d 413 (D.Conn. 2003).

**These stories, as well as the countless stories left undiscovered and untold, make it clear: discovery reform is a necessity.** In case after case, federal prosecutors have failed to discharge their constitutional obligation under *Brady*, whether as a result of intentional tactical decisions, negligence, or a misunderstanding of the obligation. To address this problem, Senator Murkowski's recently proposed discovery reform legislation creates clear and meaningful standards governing the prosecutor's duty to disclose any and all evidence favorable to the defendant.

The "Fairness in Disclosure of Evidence Act of 2012" (S. 2197) provides that in a federal criminal prosecution, the prosecutor must provide to the defendant any "favorable" information that is either in the possession of the prosecution team or would become known to the prosecutor through the exercise of due diligence, without delay after arraignment. It provides a mechanism by which prosecutors can seek a protective order in the rare case in which there is a reasonable basis to believe that disclosure would endanger a witness. The bill also explicitly exempts any classified information from its purview and instead makes clear that such information will continue to be handled, as it is now, under the provisions of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. §§ 1-16. Lastly, the bill provides the court with wide discretion to provide an appropriate remedy for noncompliance.

Once you have heard about the serious failures in the prosecution of Senator Stevens, I am confident that you will determine it necessary to hold additional hearings to further explore the need for discovery reform and, in particular, the merits of Senator Murkowski's proposal. The time for a more transparent and level playing field in the criminal justice system is now.

Thank you for your consideration, and please do not hesitate to contact me if you have any questions or want additional information.

Sincerely,



Lisa Monet Wayne  
President

cc: The Honorable Herb Kohl; The Honorable Dianne Feinstein; The Honorable Chuck Schumer; The Honorable Dick Durbin; The Honorable Sheldon Whitehouse; The Honorable Amy Klobuchar; The Honorable Al Franken; The Honorable Christopher Coons; The Honorable Richard Blumenthal; The Honorable Orrin Hatch; The Honorable Jon Kyl; The Honorable Jeff Sessions; The Honorable Lindsey Graham; The Honorable John Cornyn; The Honorable Michael Lee; The Honorable Tom Coburn