

# **EXHIBIT A-3**

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,           Docket No. 08-231  
  Plaintiff,  
  
  v.                                 Washington, D.C.  
  **Tuesday, April 7, 2009**  
  10:10 a.m.  
  
THEODORE F. STEVENS,  
  Defendant.  
-----X

**MOTION HEARING**  
*BEFORE THE HONORABLE EMMET G. SULLIVAN*  
*UNITED STATES DISTRICT JUDGE*

APPEARANCES:

For the Government:    UNITED STATES DEPARTMENT OF JUSTICE  
  Criminal Division, Narcotic and  
  Dangerous Drug Section  
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APPEARANCES cont'd on next page.

1 APPEARANCES, cont'd.

2 For the Defendant: WILLIAMS & CONNOLLY, L.L.P.  
3 By: Mr. Brendan V. Sullivan  
4 Mr. Robert M. Cary  
5 Mr. Alex G. Romain  
6 Ms. Beth Stewart  
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18 Court Reporter: Catalina Kerr, RPR  
19 Official Court Reporter  
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25 Proceedings recorded by mechanical stenography, transcript  
produced by computer.

1 P-R-O-C-E-E-D-I-N-G-S

2 (10:10 P.M.; OPEN COURT; DEFENDANT PRESENT WITH HIS  
3 ATTORNEYS.)

4 THE DEPUTY CLERK: Criminal Case 08-231, United  
5 States versus Theodore Stevens. Would counsel please identify  
6 yourselves for the record.

7 MR. O'BRIEN: Paul O'Brien, David Jaffe, Bill  
8 Stuckwisch for the United States.

9 THE COURT: Good morning.

10 MR. CARY: Good morning, Your Honor. Joe Terry,  
11 Alex Romain, Beth Stewart, Brendan Sullivan, and Rob Cary for  
12 Senator Stevens, who's present.

13 THE COURT: All right. Good morning. This is  
14 indeed a dramatic day in a case that has -- has had many  
15 dramatic and unfortunately many shocking and disturbing  
16 moments. For nearly 25 years I have told defendants appearing  
17 before me that in my courtroom they will receive a fair trial  
18 and that I will make sure of it. In nearly 25 years on the  
19 bench, I've never seen anything approaching the mishandling  
20 and misconduct that I've seen in this case.

21 Before we hear from the parties this morning, the  
22 Court believes it is important to take a few minutes to talk  
23 about how we got to this point in this case and to share some  
24 thoughts about what we, as a legal community, need to do to  
25 safeguard the integrity of our criminal justice system.

1           The United States Government has an obligation to  
2 pursue convictions fairly and in accordance with the  
3 Constitution, and when the Government does not meet its  
4 obligations to turn over evidence, the system falters.

5           Again and again, both during and after the trial in  
6 this case, the Government was caught making false  
7 representations and not meeting its discovery obligations.  
8 And each time those false representations or unmet obligations  
9 came to light, the Government claimed that it had simply made  
10 a good faith mistake, that there was no ill intent and/or that  
11 the Court had already taken steps to address the problem and  
12 therefore there was no need for court action.

13           When the Government failed to produce Rocky  
14 Williams' exculpatory grand jury testimony, the Government  
15 claimed that this testimony was immaterial. When the  
16 Government sent Mr. Williams back to Alaska without advising  
17 the Defense or the Court, notwithstanding the Court's  
18 interactions with counsel for the parties that weekend, the  
19 Government asserted that it was acting in, quote, good faith,  
20 end quote.

21           When the Government affirmatively redacted  
22 exculpatory statements from FBI Form 302s, it claimed that,  
23 quote, it was just a mistake, end quote.

24           When Government counsel told the Court that Bill  
25 Allen had not been reinterviewed the day before a hearing on

1 its *Brady* disclosures, that was a, quote, mistaken  
2 understanding, end quote.

3 When the Government failed to turn over exculpatory  
4 statements from Dave Anderson, it claimed that they were  
5 immaterial.

6 When the Government failed to turn over a critical  
7 grand jury transcript containing exculpatory information, it  
8 claimed that it was inadvertent.

9 When the Government used business records that the  
10 Government undeniably knew were false, it said that it was  
11 unintentional.

12 When the Government failed to produce the bank  
13 records of Bill Allen, it claimed that a check included in  
14 those bank records was immaterial to the Defense.

15 When an FBI agent involved with the investigation  
16 and prosecution filed a complaint alleging misconduct on the  
17 part of the prosecutors and another FBI agent, not only did  
18 the Government seek to keep that complaint a secret but the  
19 Government claimed that the allegations had nothing to do with  
20 the verdict and no relevancy to the Defense, that the  
21 allegations could be addressed by the Office of Professional  
22 Responsibility's investigation and that any misconduct had  
23 already been addressed and remedied during the trial.

24 In fact, as recently as February the 6<sup>th</sup>, the  
25 Government told the Court that there was no need for any

1 post-trial discovery and that the Government was, and I quote,  
2 confident that its response to the Defendant's post-trial  
3 motions would resolve the need for further inquiry into the  
4 allegations as they relate to the trial and the convictions of  
5 the Defendant, end quote.

6 And yet, after the Court held three senior attorneys  
7 in contempt for blatantly failing to comply with this court's  
8 order to produce documents and a new team of prosecutors was  
9 assigned to the case, we learned for the first time what may  
10 well be the most shocking and serious *Brady* violations of all,  
11 that the Government failed to tell the Defense of an interview  
12 with Bill Allen in which Allen stated that he did not recall a  
13 conversation with Bob Persons about sending the Senator a bill  
14 and that Allen estimated the value of the VECO work on the  
15 Senator's home at \$80,000, far less than the hundreds of  
16 thousands of dollars the Government had alleged at trial.

17 As this court said during the trial, and I quote,  
18 this is not about prosecution by any means necessary, end  
19 quote, and as the Court also said, and I quote, the fair  
20 administration of justice does not depend on the luck of the  
21 draw or a lucky day or a lucky continuance, end quote; indeed,  
22 it should not depend on who represents the Defendant, whether  
23 an FBI agent blows a whistle, a new administration, a new  
24 attorney general or a new trial team. The fair administration  
25 of justice depends on the Government meeting its obligations

1 to pursue convictions fairly and in accordance with the  
2 Constitution. There was no question whatsoever in this case  
3 that the Government knew of its obligations. The Court issued  
4 discovery orders and talked about *Brady* from Day One;  
5 nevertheless, the Government repeatedly failed to meet those  
6 obligations.

7 The importance of these obligations cannot be  
8 overstated. As the Supreme Court explained in its 1999  
9 decision in a case of *Strickler versus Green*, and I quote, in  
10 *Brady*, this court held that the suppression by the prosecution  
11 of evidence favorable to an accused upon request violates due  
12 process where the evidence is material either to guilt or to  
13 punishment, irrespective of the good faith or bad faith of the  
14 prosecution.

15 "We have since held that the duty to disclose such  
16 evidence is applicable, even though there has been no request  
17 by the accused, and that the duty encompasses impeachment  
18 evidence as well as exculpatory evidence. Such evidence is  
19 material if there is a reasonable probability that, had the  
20 evidence been disclosed to the defense, the result of the  
21 proceeding would have been different.

22 "Moreover, the rule encompasses evidence known only  
23 to police investigators and not to the prosecutor. In order  
24 to comply with *Brady*, therefore, the individual prosecutor has  
25 a duty to learn of any favorable evidence known to the others



1 acting on the Government's behalf in this case, including the  
2 police. These cases, together with earlier cases condemning  
3 the knowing use of perjured testimony, illustrate the special  
4 role played by the American prosecutor in the search for truth  
5 in criminal trials.

6 "Within the federal system, for example, we have  
7 said that the United States Attorney is the representative,  
8 not of an ordinary party to a controversy but of a sovereignty  
9 whose obligation to govern impartially is as compelling as its  
10 obligation to govern at all, and whose interest, therefore, in  
11 a criminal prosecution is not that it shall win a case, but  
12 that justice shall be done, end quote.

13 We must never forget the Supreme Court's directive  
14 that a criminal trial is a search for the truth. Yet in  
15 several cases recently this court has seen troubling failures  
16 to produce exculpatory evidence in violation of the law and  
17 this court's orders. Whether you are a public official, a  
18 private citizen or a Guantanamo Bay detainee, the prosecution,  
19 indeed the United States Government must produce exculpatory  
20 evidence so that justice shall be done.

21 I, therefore, urge my judicial colleagues on every  
22 trial court everywhere to be vigilant and to consider entering  
23 an exculpatory evidence order at the outset of every criminal  
24 case, whether requested to do so or not, and to require that  
25 the exculpatory material be turned over in a useable format

1 because, as we've seen in this case, the use of summaries is  
2 an opportunity for mischief and mistake, and I encourage the  
3 Attorney General, for whom I have the highest regard, to  
4 require *Brady* training for new and veteran, experienced  
5 prosecutors throughout the country and also encourage an open  
6 dialogue between defense attorneys and prosecutors regarding  
7 these discovery obligations.

8 Further, I urge the President and the Attorney  
9 General, as they select new United States attorneys, to obtain  
10 from those appointees their commitments to fulfilling these  
11 important obligations, and indeed, the Senate confirmation  
12 process should also address these most important prosecutorial  
13 obligations.

14 Those are a few thoughts about how we got to this  
15 point and where we go from here. I'll have more to say in a  
16 few minutes, but first I'll hear from the Government. We are  
17 here on the Government's motion to set aside the verdict and  
18 dismiss the indictment with prejudice.

19 Before I hear from the Government, I want to  
20 recognize Mr. O'Brien, Mr. Jaffe and Mr. Stuckwisch. The  
21 record in this case was voluminous with a post-trial docket  
22 even more extensive than the trial docket. The Court has no  
23 doubt that the three of you worked around the clock over the  
24 last seven weeks reviewing evidence, transcripts, pleadings,  
25 opinions and orders, to so thoroughly familiarize yourself

1 with that record that you were able to recognize what  
2 information had not been turned over and why that information  
3 was relevant. It could not have been an easy task, and the  
4 Court thanks you for your efforts. Counsel.

5 MR. O'BRIEN: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. O'BRIEN: Pursuant to Rule 48 of the Federal  
8 Rules of Criminal Procedure, the United States respectfully  
9 moves this court to set aside the verdict and dismiss the  
10 indictment with prejudice, and as I indicated to the Court  
11 last week, my comments this morning will be brief.

12 I just want to talk a little bit about how we  
13 arrived at the decision we arrived at and generally where we  
14 got to this morning. As the Court knows, in February of 2009,  
15 Rita Glavin, the acting head, the Acting Assistant Attorney  
16 General for the criminal division appointed myself, Mr. Jaffe  
17 and Mr. Stuckwisch to handle the post-trial litigation in this  
18 matter.

19 Specifically, we were asked to handle any litigation  
20 arising from the complaint that was filed by Special Agent  
21 Joy, and I know the Court is very familiar with that  
22 complaint.

23 As the Court is also aware, we conducted a number of  
24 witness interviews, reviewed documents in order to prepare for  
25 the Government's response to the Defendant's motion to dismiss

1 and also to prepare for a potential evidentiary hearing  
2 concerning the allegations in the Joy complaint.

3 We thought it was important that we engage that  
4 process and be as transparent as possible with the Court and  
5 with the Defense, and that is why we elected early on to  
6 voluntarily produce the 302s generated from the witness  
7 interviews as we were preparing to file a response to the  
8 motion to dismiss and for the potential evidentiary hearing.

9 It was during this process that we learned that  
10 Mr. Allen had been interviewed on April 15<sup>th</sup>, 2008. The  
11 Court has, I think, accurately summarized the statements that  
12 are in our pleading concerning what we learned of that  
13 interview, and I think certainly the Court, having heard and  
14 tried this case, knows the significance not only of  
15 Mr. Allen's trial testimony but also the significance of the  
16 information contained in the notes that was not provided to  
17 the Defense.

18 The Government was obligated to produce the  
19 information from the April 15<sup>th</sup>, 2008 interview with  
20 Mr. Allen to the Defense, and they did not do so.

21 Once we learned that, our focus shifted from looking  
22 at the allegations in the joint venture complaint to dealing  
23 with this issue because we recognized it was a serious and  
24 important issue. What we did is what we were obligated to do  
25 is we immediately provided that information to the Defense.

1 And I certainly appreciate the Court's kind comments this  
2 morning, but really, in my view, Mr. Jaffe, Mr. Stuckwisch and  
3 myself did only what we were obligated to do, which was once  
4 we found that information, to provide it to the Defense.

5 We saw that information --

6 THE COURT: So what you did was, you did what should  
7 have been done months ago.

8 MR. O'BRIEN: Well, we --

9 THE COURT: At least a year ago, almost a year to  
10 the date, April 15<sup>th</sup>; is that correct?

11 MR. O'BRIEN: The interview was April 15<sup>th</sup>, yes,  
12 Your Honor.

13 We recognized the importance of that information,  
14 and in analyzing that information and in looking at the trial  
15 and the particular facts of this case, we reached the  
16 conclusion that in the interest of justice, the Defendant was  
17 entitled to a new trial, that the failure to turn over that  
18 information warranted a new trial.

19 At that point, Your Honor, the issue became, should  
20 we retry the Defendant? Should the Department of Justice  
21 retry this particular Defendant, given the facts of this  
22 particular case? And as the Court knows, the Attorney General  
23 decided that in this particular case that it was in the  
24 interest of justice not to retry this Defendant.

25 I hope the Court appreciates one thing this morning,

1 speaking on behalf of the Department, we deeply, deeply regret  
2 that this occurred. We would ask the Court to grant the  
3 Government's motion, dismiss the indictment with prejudice,  
4 and again, I apologize to the Court and we deeply regret that  
5 this occurred. I would ask the Court grant our motion.

6 THE COURT: All right. Let me ask you this,  
7 Counsel, and I need a very precise answer to this question.  
8 The Government counsel will concede, will it not, that the  
9 failure to produce the notes or information from the April 15,  
10 2008 interview with Bill Allen in which he did not recall  
11 having a conversation with Bob Persons about sending the bill  
12 to the Senator was a *Brady* violation?

13 MR. O'BRIEN: It was a *Brady* violation. It was  
14 impeaching material, and the Court knows that *Giglio* is a  
15 subset of *Brady*.

16 THE COURT: Right.

17 MR. O'BRIEN: Also, there was -- I failed to mention  
18 this and I should have. The Court did mention it, but there  
19 was also information about the value of the work that was  
20 performed.

21 THE COURT: And that was going to be the second  
22 question. Indeed, was that a *Brady* violation as well?

23 MR. O'BRIEN: I believe that was. At a minimum, it  
24 was favorable evidence to the Defense that should have been  
25 turned over pursuant to the instructions that Your Honor

1 previously mentioned.

2 THE COURT: All right. And if I understand it  
3 correctly, this information was noted in -- in witness  
4 interview sheets maintained by attorneys at the Department of  
5 Justice?

6 MR. O'BRIEN: The information that we learned was --  
7 as we pointed out in our papers, were interview notes of  
8 prosecutors.

9 THE COURT: The prosecutors. Does the Government  
10 intend to make public the results of the OPR investigation?  
11 And if not, does the Government have a view as to whether  
12 there are restrictions on the Court's ability to make public  
13 those results?

14 MR. O'BRIEN: That is a fair question, Your Honor.  
15 Let me just -- if I can just walk the Court through.

16 THE COURT: Sure.

17 MR. O'BRIEN: I am not trying to duck the answer --

18 THE COURT: No, I understand that.

19 MR. O'BRIEN: Duck the question, excuse me.

20 THE COURT: No.

21 MR. O'BRIEN: As we indicated in our --

22 THE COURT: This team hasn't ducked anything, and I  
23 appreciate that.

24 MR. O'BRIEN: As we indicated in our pleading, the  
25 Government will share the findings of the OPR inquiry with the

1 no objection to the unsealing of the bench conferences.

2 THE COURT: All right. Defense counsel?

3 MR. CARY: Your Honor, Defense has reviewed them and  
4 we have no objection as well, and we filed a pleading to that  
5 effect this morning.

6 THE COURT: All right. That's fine. Therefore, the  
7 Court will direct that the bench conferences be unsealed and  
8 posted on the public docket. There is one off-the-record  
9 discussion that the Court held a month or two ago, and that  
10 will remain sealed.

11 Finally, the Court has repeatedly been told that the  
12 office of professional responsibility at the Department of  
13 Justice is conducting an investigation into the investigation  
14 and prosecution in this case. The Court first heard about an  
15 investigation on October the 2<sup>nd</sup> during the trial when a  
16 member of the prosecution team informed the Court that the  
17 prosecution team had, in her words, self-reported,  
18 quote/unquote, to the Office of Professional Responsibility  
19 because the Court had found a *Brady* violation.

20 That was six months ago. The Court next heard about  
21 the OPR investigation when the Government assured the Court it  
22 need not take any action based on the Joy complaint because  
23 OPR was conducting a thorough investigation. That was four  
24 months ago. And yet, and to date, the silence has been  
25 deafening.



1           Similarly, the Defense tells us just moments ago  
2 they received no response to their numerous letters to former  
3 Attorney General Mukasey urging him to commence a formal  
4 investigation. Shocking but not surprising.

5           The Court looks forward to receiving the results of  
6 the OPR investigation whenever that investigation concludes.  
7 But the events and allegations in this case are too serious  
8 and too numerous to be left to an internal investigation that  
9 has no outside accountability. This court has an independent  
10 obligation to ensure that any misconduct is fully investigated  
11 and addressed in an appropriate public forum.

12           Accordingly, the Court shall commence criminal  
13 contempt proceedings against the original prosecution team,  
14 including William Welch, Brenda Morris, Joseph Bottini,  
15 Nicholas Marsh, James Goeke and Edward Sullivan pursuant to  
16 the Court's authority under Federal Rule of Criminal Procedure  
17 42, based on failures of those prosecutors to comply with the  
18 Court's numerous orders and potential obstruction of justice.

19           Moreover, as provided by that Rule and because the  
20 subject attorneys are employed by the Department of Justice,  
21 the Court finds that the interest of justice requires the  
22 appointment of a non-Government disinterested attorney to  
23 prosecute that matter. Therefore, the Court will appoint  
24 attorney Henry F. Schuelke, S-c-h-u-e-l-k-e, III, as  
25 prosecutor. Mr. Schuelke is a partner at the D.C. law firm,

1 Janis, Schuelke & Wechsler, and enjoys an outstanding local  
2 and national reputation for fairness, integrity and sound  
3 judgment.

4 Mr. Schuelke has served as a military judge in the  
5 United States Army judiciary. He also served for seven years  
6 as an Assistant United States Attorney for the District of  
7 Columbia, including three years as Executive Assistant United  
8 States Attorney. He has also serve as special counsel for the  
9 United States Senate Committee on Foreign Relations and  
10 Special Counsel to the United States Senate Select Committee  
11 on Ethics. He currently serves as Special Counsel to the  
12 District of Columbia Commission on Judicial Disabilities and  
13 Tenure.

14 Mr. Schuelke will investigate this matter with a  
15 view toward filing an order to show cause, if appropriate.  
16 Let me stress that I have not, by any means, prejudged these  
17 attorneys or their culpability. I do not take this decision  
18 lightly and I certainly hope the record will ultimately find  
19 no intentional obstruction of justice.

20 Nevertheless, the Court has an obligation to  
21 determine what happened here and respond appropriately, and I  
22 intend to do so. To that end, the Court anticipates and  
23 expects the United States' full cooperation in any further  
24 proceedings, and indeed the Court will direct the United  
25 States Government to cooperate fully with Mr. Schuelke,

1 including providing him access to investigative files and  
2 witnesses.

3 Now, at this point, the Court will focus on the  
4 Government's motion to set aside the verdict and dismiss the  
5 indictment with prejudice. The Court has the highest regard  
6 for Attorney General Eric Holder. The Court had the honor of  
7 serving on the Superior Court with him briefly and the Court  
8 knows that Eric Holder has earned his impeccable reputation as  
9 a lawyer firmly committed to fairness, integrity and the rule  
10 of law.

11 Accordingly, the Court respects Mr. Holder's  
12 decision to seek dismissal of this case in view of the  
13 totality of circumstances surrounding this investigation and  
14 prosecution, and the Court concurs with the Attorney General  
15 that it is in the interest of justice that this verdict be set  
16 aside and the indictment be dismissed with prejudice.

17 Accordingly, the Court grants the Government's  
18 motion and dismisses this case with prejudice and indeed with  
19 no prejudice to Rule 42 proceedings, as previously announced  
20 by the Court. An appropriate order shall be entered today.

21 I actually have no further remarks at this point.  
22 Before I recess, though, it's been a long hearing, a lot has  
23 been said by everyone, including the Court. I want to take a  
24 five-minute recess just to make sure that I have not  
25 overlooked anything that needs to be said this morning. The