EXHIBIT A-3

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

APPEARANCES:

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APPEARANCES cont'd on next page.

APPEARANCES, cont'd.

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Proceedings recorded by mechanical stenography, transcript produced by computer.

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

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

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

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

THE COURT: Good morning.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In fact, as recently as February the 6th, the Government told the Court that there was no need for any

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Good morning.

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

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

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

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

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

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

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

The Government was obligated to produce the information from the April 15th, 2008 interview with Mr. Allen to the Defense, and they did not do so.

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

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

We saw that information --

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

MR. O'BRIEN: Well, we --

THE COURT: At least a year ago, almost a year to the date, April 15th; is that correct?

MR. O'BRIEN: The interview was April 15th, yes, Your Honor.

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

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

I hope the Court appreciates one thing this morning,

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

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

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

THE COURT: Right.

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

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

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

previously mentioned.

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

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

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

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

THE COURT: Sure.

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

THE COURT: No, I understand that.

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

THE COURT: No.

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

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

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

no objection to the unsealing of the bench conferences.

THE COURT: All right. Defense counsel?

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

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

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

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

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

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

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

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

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

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

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

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

including providing him access to investigative files and witnesses.

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

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

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

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