

PROSECUTION TANKS IN TOOBZ STEVENS TRIAL

Ted Stevens has been sitting in the courtroom of Judge Emmet Sullivan in the E. Barrett Prettyman Federal Courthouse in DC since jury selection began on September 22. This morning the excrement hit the fan. Big time. Stevens' attorney, Brendan Sullivan, has moved for dismissal of the charges against Stevens, and he just may get it. The prosecution has screwed the pooch in a fundamental and intentional way.

From a wire report off of Reuters filed an hour ago:

Lawyers for Republican U.S. Sen. Ted Stevens of Alaska urged a judge Thursday to dismiss the corruption case against him because they said prosecutors had withheld evidence helpful to their defense.

U.S. Justice Department prosecutor Brenda Morris admitted a mistake had been made, but asked the judge to allow the trial to go forward. "We are human and we made an error," she said. "It was a mistake."

The information involved an interview by an FBI agent with Bill Allen, the prosecution's star witness. In the interview, Allen said he believed Stevens and his wife would have paid for the renovations to their home in Alaska if Allen had sent them a bill.

Prosecutors had notified the defense about the information only late Wednesday, after Allen had completed his second day of testimony.

Stevens's attorney Brendan Sullivan asked the judge to dismiss the indictment. "It goes to the core of the defense," he said.

U.S. District Judge Emmet Sullivan did not immediately rule on the request to throw out the case, but he clearly was angered by the mistake, calling it "unbelievable" and "very troubling."
(emphasis added)

This is really bad. Blatant intentional withholding by the prosecution of exculpatory evidence. And it is evidence that bores straight into the heart of Stevens' not guilty defense. The defense did not learn of the existence of this until long after Allen took the stand. The directly and materially exculpatory to Stevens. There is no way to argue that Stevens' attorney would not have conducted his examination of all witnesses to date, much less Bill Allen, differently with knowledge of this in the government's evidence set.

Here is the clincher.

The new evidence involved an interview that had been turned over to the defense, but the key part of what Allen said – that the couple would pay if they had been sent a bill – had been blacked out.

How do you not view this as intentional and malicious conduct by the prosecution? The key exculpatory portion of the witness statement, of the most important and star prosecution witness, Bill Allen, owner of VECO, blacked out and hidden from the defense? Please. That is intentional and flagrant.

When you hear legal types discussing "Brady material" or "Brady evidence", this is exactly what they are describing. Under the seminal case of *Brady v. Maryland* (maybe we should ask Sarah Palin) the prosecution must disclose to the defendant any exculpatory evidence they possess. Failure to so disclose can result in the dismissal of a case.

The situation in Stevens' case is awfully

blatant and clearly exculpatory. It should result in at least a mistrial; if I were the judge I would bounce the entire indictment with prejudice. If a defendant can't obtain relief on this fact set, then the theory in *Brady v. Maryland* has no meaning. Those judges in DC must be ready to explode over what this justice department has done over the last 8 years. The prosecution is in for a reaming of some sort either this afternoon or tomorrow morning. Stay tuned.

UPDATE: McClatchy has some additional information up:

The lead Justice Department prosecutor, Brenda Morris, equally angry, had this response: "He's getting a fair trial, believe me. You're getting a great fair trial."

Infuriated, U.S. District Judge Emmet Sullivan said he found it "unbelievable."

"It strikes me this is probably intentional," the judge said. "This is the government's chief witness!"

...

Judge Sullivan sent the jurors home for the day. He'll hold a hearing later Thursday afternoon to determine whether to dismiss the case.

"Maybe they'll come back tomorrow for further service, maybe they won't," he said.

Even if it wasn't intentional, he told prosecutors, it was "gross negligence on the part of the government."

He bristled at the prosecution's characterization that it was "lucky" that Allen was still on the stand and had yet to finish his testimony for the government, let alone be cross-examined by Stevens' attorneys.

"It shouldn't have to be lucky to get the government to do its job," Sullivan said. "The fair administration of justice doesn't depend on the luck of the draw, a lucky day or a lucky continuance."

The judge is right, this is very offensive conduct from a due process standpoint. The withheld evidence goes directly, and I mean directly, to the element of intent. The prosecution argues that it is harmless error because they have adduced testimony that Stevens requested bills (actually additional bills, because it is established that Stevens paid a substantial sum, just not enough to allegedly cover all the work), but that Allen didn't forward them. However, the blacked out (redacted) portion of their disclosure directly and unequivocally states that Allen believes that Stevens would have paid if he had been billed further. This mitigates intent as to Stevens and belief in existence of a crime on the part of the key prosecution witness, Allen.

There is some salvation in that Allen has not been cross-examined yet; but if the defense can show how they would have done things with the opening statement and examination of other witnesses sufficiently differently, they have a heck of an argument.

If I were Stevens' attorney, I would already have had the junior members of my team combing the daily express court transcripts for instances in the opening statement, and with every witness that has been on the stand to date, as to how I might have argued and examined differently; specifically with an eye to how the theory of defense itself may have been altered. Might even go back into motions if there is any ground there to plow there.

If the prosecution argues that it is explained by mistake because Stevens demanded a quick trial, I would jam that up their rear. Exercise of Constitutional speedy trial rights does not

mitigate due process guarantees and they ought to be humiliated in so arguing. Did they say they were not ready for trial because they needed more time to comply? No. By arguing that nonsense, the prosecution only looks worse.

It will be fascinating to see what remedy for the prosecutorial misconduct Judge Sullivan imposes. And, as Christy noted earlier, there has been other misconduct that the judge already was not happy about.