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January 6, 2017

The Honorable Charles Grassley  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Dianne Feinstein  
Ranking Member, Committee on the Judiciary  
United States Senate  
331 Hart Senate Office Building  
Washington, D.C. 20510

**Re: Nomination of Senator Jeff Sessions for Attorney General of the United States**

Dear Senators,

I am submitting this letter in connection with the nomination by President-Elect Donald J. Trump of Senator Jeff Sessions to become Attorney General of the United States. Based on my experience, training, study, and scholarship, it is my professional opinion that Senator Sessions is unfit to serve as the nation's chief law enforcement officer. My opinion rests in large part on a criminal case he supervised when he served as the Attorney General of the State of Alabama. That case was hailed as "the case of the most magnitude that the Attorney General's office had undertaken in the last twenty-five years." That case, *State of Alabama v. TIECO, et al.*, was a professional disaster for Senator Sessions from its inception to its crashing conclusion. The investigation and prosecution of this case by the Attorney General was permeated by massive, repeated, and deliberate prosecutorial misconduct, demonstrated a contempt for the rights of persons accused of crimes, and constituted a flagrant abuse of the awesome instruments of the criminal law.

This is the first time I have ever written to oppose a president-elect's nominee.

### **My Background**

I have had considerable experience as a prosecutor, defense attorney, and academic. I have written extensively on a prosecutor's ethical duties. I served as an Assistant District Attorney in the New York County District Attorney's Office from 1966-1972 where I worked in the homicide, rackets, appeals, and major felonies bureaus. I investigated cases, presented cases to grand juries, and tried felony cases to verdict. I then I served as an Assistant Attorney General in the Office of the New York State Special Prosecutor from 1972-1976 which was established to investigate and prosecute public corruption in New York City's criminal justice system. I served as Chief of the Appeals Bureau and the Bronx Anti-Corruption Bureau where I investigated cases, presented cases to special grand juries, and prosecuted judges, prosecutors, lawyers, public officials, and police officers accused of fraudulent, dishonest, and corrupt conduct.

I am currently a tenured Professor of Law at the Elizabeth Haub Law School, in White Plains, New York, where I have been a professor since 1976. I teach courses relating to criminal law, criminal procedure, and trial conduct, and professional ethics. During my academic career I have represented as a defense attorney persons charged with serious felonies, including several murder cases, and have represented clients before federal and state grand juries. I am frequently consulted as an expert on criminal procedure, prosecutorial misconduct, and professional ethics. I have testified as an expert witness in legal proceedings and before the U.S. Congress, the New York State Legislature, and various professional and fact-finding Commissions.

I have written a treatise on the prosecutor's conduct and ethics entitled Prosecutorial Misconduct (2d ed. Thomson/West, supplemented annually). The treatise is frequently cited by courts and commentators. I have also written a treatise on criminal trial errors, entitled Criminal Trial Error and Misconduct (3d edition Lexis-Nexis, supplemented annually). I write extensively on the prosecutor's legal and ethical duties, lecture often to judges, prosecutors, bar associations, and other professional and civic groups, and write often on issues of criminal procedure and professional ethics. I have provided my expert opinions in the following legal proceedings:

- State of Alabama v. Michael Hubbard, No. CC2014-565 (Circuit Court, Lee County)(October 27, 2015)(affidavit and testimony).
- Bozella v. County of Dutchess, No. 10 Civ. 4917 (CS)(SDNY, January 2015)(report and deposition).
- State of Missouri ex rel. Montague Simmons v. Robert McCullough St. Louis County Prosecuting Attorney, Cause No. 15SL-CC00177 (May 4, 2015)(affidavit).
- Robert Bertuglia v. City of New York, 11 Civ. 2141 (JGK) (Oct. 2014)(report)
- Donald Eugene Gates v. The District of Columbia, Case 1:11-cv-0040-RWR-AK (D.D.C) (Sept. 2012)(report and deposition.)
- State Bar of Arizona v. Thomas, Aubuchon, and Alexander (August 30, 2011)(report and deposition)
- Oliver Jovanovic v. City of New York et al. (2009)(report)
- Kevin Fox v. Will County (October 18, 2007)(report and deposition)

- Harrington v. Pottawattamie County (January 22, 2007)(report and deposition)
- State of Louisiana v. Kyles (October 31, 1997)(report and testimony)
- State of Connecticut v. Valentin (March, 1995)(report and testimony)
- Commonwealth of Kentucky v. Davidson (April, 1992)(testimony)
- In the Matter of the Discipline of an Attorney, 2 Mass. Attorney Discipline Reports 110 (1980)(testimony)

**Judge James S. Garrett Dismisses 10 Indictments, Finding Attorney General Sessions Engaged in the Worst Misconduct That Judge Garrett Had Ever Seen**

On July 16, 1997, Judge James S. Garrett, Circuit Judge of Jefferson County, Alabama, dismissed ten indictments obtained by the office of Alabama Attorney General Sessions against defendant TIECO, INC., and several individual defendants. Judge Garrett in his order of dismissal made the following statements:

The misconduct of the Attorney General in this case far surpasses in both extensiveness and measure the totality of any prosecutorial misconduct ever previously presented to or witnessed by the Court. (2).<sup>1</sup>

The prosecutorial misconduct is so pronounced and persistent that it permeates the entire atmosphere of this prosecution and warrants a dismissal of these cases. (2).

This court can only conclude it is dealing with either intentional and deliberate misconduct or conduct so reckless and improper as to constitute conscious disregard for the lawful duties of the Attorney General and the integrity and dignity of this court and this Judge.(2).

Statements were made by the Attorney General's Office without regard to their accuracy. (9).

The Attorney General's Office continued to disregard the order of the Court concerning the discovery order. (11).

This Court does find the apparent changing of evidence [by the Attorney General's Office] is a matter of grave concern as the Attorney General's Office is not and should not be above the law in the prosecution of any criminal case or any other matters which it endeavors to pursue. (13).<sup>2</sup>

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<sup>1</sup> Unless otherwise noted, numbers in parenthesis refer to the opinion of Judge James S. Garrett, Circuit Judge of Jefferson County, Alabama, dated July 16, 1997, in *State of Alabama v. TIECO, INC., et al.*, Case Nos. CC-96-2961 et seq.).

<sup>2</sup> Judge Garrett stated: "the misconduct as described in this order is only a summary of some of the misconduct as presented to this Court and is so pronounced and persistent that it permeates the entire atmosphere of this prosecution and warrants a dismissal of these cases." (13).

## **Attorney General Sessions Launches Investigation Against TIECO**

The long and winding saga of this failed prosecution began in June, 1995, when Marty Colby, an ex-employee of TIECO, a corporation selling industrial equipment, alleged that TIECO engaged in fraudulent billing practices in its sale of equipment to U.S. STEEL (USX). Colby asserted that with the aid of disloyal USX employees, TIECO billed USX for materials never purchased and never received. From the outset there were serious questions about Colby's credibility which the Attorney General's Office, or any prosecutor's office, should have recognized. Colby was presently working for a competitor of TIECO and his allegations could reasonably be seen as securing for his new company a competitive advantage. Based exclusively on Colby's assertions, Alabama Attorney General Sessions commenced an investigation of TIECO. His office publicly proclaimed this case as "a case of the most magnitude that the Attorney General's Office had undertaken in the last twenty-five years." (3-4).<sup>3</sup>

## **USX Runs The TIECO Investigation**

From the outset, the Attorney General's investigation seemed to rely almost entirely on the participation of USX and its attorneys, and seemed to be focused more on assisting this alleged corporate victim than determining objectively whether an investigation of TIECO was warranted in the public interest and was an efficient use of law enforcement resources. Indeed, a prosecutor's office in conducting investigations and prosecutions is constitutionally and ethically obligated to maintain its independence and objectivity in order to fairly and impartially enforce the criminal law in the public interest.<sup>4</sup> But it soon became evident that the Attorney General's Office maintained not merely a close and ongoing collaboration with USX and its lawyers in its investigation of TIECO but essentially delegated a substantial involvement, even control, to USX over many aspects of the investigation. It was almost as if USX was assigned by the Attorney General's Office as a quasi-government entity.<sup>5</sup>

The symbiotic relationship between the Attorney General and USX was manifest in numerous ways. They worked together interviewing witnesses; they shared information and summaries of witness interviews; they jointly conferred on strategy; they shared information about vendors other than TIECO, and shared expenses; Victor Hayslip, Colby's lawyer who was acting on USX's behalf, sent the Attorney General summaries of TIECO's accounts receivables,

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<sup>3</sup> It is noteworthy that Colby's attorney, Victor Hayslip, was an attorney with the firm of Burr & Foreman, which served as USX's outside counsel for many years and, along with USX, contributed heavily to Session's electoral campaign. See Appendix to Judge Garrett's opinion, "Timeline of Events," p. 1, Exhibit 132. Judge Garrett in his opinion, attached the defendants' memorandum in support of the motion to dismiss. Judge Garrett, stated that the motion contains a lengthy and detailed statement of facts. After carefully reviewing the record, Judge Garrett found that the statement of facts was accurate and correct and adopted the statement by reference and incorporated it as a basis for his findings and conclusions (13).

<sup>4</sup> See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)(attorney who represented private party and was engaged as a special prosecutor to bring contempt charges against other party unable to perform prosecutorial role in disinterested manner).

<sup>5</sup> See *UNITED STATES STEEL, LLC, v. TIECO, INC.*, 261 F.3d 1275 (11<sup>th</sup> Cir. 2001)(opinion by Eleventh Circuit Court of Appeals reviewing federal lawsuit brought by U.S. STEEL on December 15, 1995, against TIECO and other defendants under Racketeer Influenced and Corrupt Organizations Act. A jury returned a verdict for defendant TIECO and other defendants. The Circuit Court affirmed in part, reversed in part, and remanded in part).

invoices, and other financial records, and repeatedly called the Attorney General about the status of the investigation; a search warrant for TIECO's records was based almost exclusively on USX interviews of Colby; documents seized from TIECO pursuant to the search warrant were disclosed to USX auditors for use by USX in preparing its civil RICO complaint against TIECO;<sup>6</sup> USX provided auditors to the Attorney General to analyze the seized TIECO materials and apprised the Attorney General of the results of its audit; USX deciphered TIECO's computer tapes at the Attorney General's expense and exchanged the results with the Attorney General; a few days after the seizure of TIECO's records USX transmitted to the Attorney General printouts of USX/TIECO transactions along with the statement that "if we have additional ideas on how you might approach the TIECO documents now in your possession, we will be in touch"; USX drafted memoranda informing the Attorney General of allegations that USX unearthed, how USX employees participated in the alleged scheme, and provided the Attorney General with personal data about these suspect employees; ground rules for interviewing its employees were established by USX – a first interview without notice to the employee by a team from the Attorney General and the FBI, and then a second interview by a team from USX; USX threatened disciplinary action and criminal prosecutions unless its employees cooperated in the investigation.

### **Ethics Complaint Brought Against Attorney General Sessions**

The investigation, heralded by the Attorney General as the most important case in the last twenty-five years, appeared to grind along aimlessly without any official action or continuity of prosecutors for nearly a year – Judge Garrett observed that the case was "literally passed around [from one assistant to another] like the proverbial 'hot potato'" (p. 4) – until May, 1996, when an ethics complaint was made in the Alabama State Ethics Commission against Attorney General Sessions by Fletcher Yielding, one of the defendants in USX's civil RICO complaint. Yielding alleged that Attorney General Sessions had given confidential and privileged information seized from TIECO pursuant to the search warrant to USX and its lawyers Burr & Foreman for use in its civil RICO complaint.<sup>7</sup> USX representatives appeared before the ethics commission and mounted an aggressive defense of Attorney General Sessions, resulting in the Commission finding insufficient evidence that Attorney General Sessions had violated Alabama's ethics laws. Sessions thanked USX for its assistance, stating it went "beyond the call of duty."<sup>8</sup>

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<sup>6</sup> As Judge Garrett observed, he found it "curious" that the information set out in the affidavit for the search warrant of TIECO was so strikingly similar to the information contained in USX's civil RICO complaint against TIECO (5).

<sup>7</sup> There was a solid basis for Yielding's ethics complaint. Federal District Judge U.W. Clemon, who presided over USX's civil RICO complaint against TIECO, stated: I am uncomfortable with a situation in which one party to a civil action has associated with the attorney general and by virtue of that association may have gained access to certain evidence which may otherwise have been privileged"; "there's something wrong when the attorney general takes all of the defendant's records, some of which may contain privileged matters, and then turns over those very records to a third-party who brings a lawsuit against the prospective defendant." (6-7).

<sup>8</sup> U.S. STEEL v. TIECO, 261 F.3d, at 1284.

### **Attorney General Sessions Rushes to Empanel Grand Jury, Indicts TIECO, and Issues Press Releases**

But the ethics complaint was a watershed event. Although the Attorney General's investigation was languishing aimlessly without any official action, once the ethics complaint against Attorney General Sessions was brought, the investigation took on a renewed and desperate urgency (Garrett opinion, p. 4). Attorney General Session demanded that a grand jury be empaneled immediately. Why the rush? Judge Garrett surmised that "the reason for this urgency [was] the hearing before the Alabama Ethics Commission of Attorney General Jeff Sessions." (pp. 4-5). One assistant attorney general called the move a "rush to judgment." (97). Another assistant attorney general claimed he understood the case "had" to be presented to a grand jury in June (97). Indeed, it appeared that the move was designed simply to get indictments whether or not the evidence warranted it.

To be sure, ten indictments were returned, with 222 counts, and Attorney General Sessions boasted in press releases that the defendants –TIECO, and others – engaged in a concerted scheme of theft, deception, and forgery. As he variously proclaimed: "These indictments are the culmination of a year-long investigation by this office." "These defendants, in cahoots with TIECO, obtained personal benefits by defrauding U.S. Steel."; "Business fraud in the marketplace has a wide-ranging impact." "This kind of white collar crime hurts everyone by undermining confidence in our economic system."; "We cannot allow these crimes to go unchecked."<sup>9</sup> Indeed, at his press conference the day before the ethics hearing, Attorney General Sessions warned the Ethics Commission that a finding against him would have a "chilling effect" and a "major impact" on law enforcement (98).

### **TIECO Indictments Dismissed**

As the Eleventh Circuit noted, "The grand jury indictments against TIECO went nowhere."<sup>10</sup> All of the indictments were ultimately dismissed, some by the Attorney General's Office, apparently to save face, and the rest by Judge Garrett, who found implicitly that notwithstanding the Attorney General's face-saving move, several indictments remained that should be dismissed because they were tainted by the Attorney General's misconduct. The basis for the dismissals is noteworthy. It strongly appears that the Attorney General's rush to empanel the grand jury was a cynical effort to deflect attention from the ethics case and create the aura of an aggressive investigation even though the evidentiary foundation for the charges was lacking. Nearly one hundred counts were dismissed because they were misdemeanors barred by the one-year statute of limitations. Other counts were dismissed because the alleged conduct happened in venues outside the grand jury's jurisdiction. Other counts were dismissed because the property claimed to have been stolen was not in fact stolen. And other counts were dismissed because the alleged stolen property never even existed. The remaining counts were dismissed by Judge Garrett based on the Attorney General's misconduct. It should also be noted that after the dismissals, and after Attorney General Sessions was elected to the U.S. Senate, his successor, Attorney General William Pryor, reviewed Judge Garrett's decision and decided not to appeal.

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<sup>9</sup> See Office of the Attorney General Jeff Sessions, Press Releases, June 26, 1996; July 8, 1996.

<sup>10</sup> U.S. STEEL v. TIECO, 261 F. 3d, at 1285.

In reviewing the conduct by the office of Attorney General Sessions, it is relevant that Senator Sessions was not a novice in law enforcement or in the administration of a law enforcement agency. Senator Sessions was the United States Attorney for the Southern District of Alabama from 1981-1993. Presumably that office investigated and prosecuted numerous federal criminal and civil matters. This experience is relevant in assessing his conduct as Alabama's Attorney General in a case billed as the most important case of his prosecutorial career. One does not accuse a prosecutor of misconduct lightly. Having reviewed thousands of cases of misconduct, it is often perfectly clear to me that a prosecutor has engaged in deliberate and willful misconduct. Occasionally a prosecutor's misconduct might be attributed to incompetence, or reckless or negligent indifference to the rights of defendants. And there are instances when prosecutors exhibit appallingly poor judgment. Where does the conduct of Attorney General Sessions fit? In my opinion, both he and the assistant in his office demonstrated throughout the TIECO investigation and prosecution a willful and even shocking disregard for proper standards for the exercise of prosecutorial power.

### **Manipulating Grand Jury Process**

The rush by the Attorney General to present the TIECO case to the grand jury, after nearly one year of inaction, has already been noted. Judge Garrett concluded, based on evidence introduced at the hearing on the defendants' motion to dismiss, that the reason for the haste was the threat of an ethics investigation before the state ethics commission. (4). Although efforts were made to accommodate the Attorney General by empaneling a grand jury in July, the Attorney General advised the District Attorney's Office that "it must do so on the June grand jury." (4). With his candidacy for the U.S. Senate underway, and the possibility that his prosecution of a case of "the greatest magnitude in twenty-five years" might be seen as a sham, as well as tainted by misconduct, there is every reason to assume that the Attorney General decided to rush the case into a grand jury as quickly as possible and secure indictments, regardless of whether the evidence supported the indictments. In my opinion, it is unlikely that after nearly a year of foot-dragging, the Attorney General suddenly, acting in good faith based on sufficient and legitimate law enforcement reasons, decided that it was in the public interest to empanel a grand jury in the TIECO case. In my opinion, and Judge Garrett's, this was an effort to manipulate the grand jury process and to secure bogus charges despite a lack of credible evidence. In my opinion, this gambit by the Attorney General may reasonably be seen as undertaken to distract attention from the ethics charges and demonstrate a strong commitment to prosecuting business fraud.

### **Grand Jury Misconduct-Failure to Record Testimony**

Furthermore, any pretense that this was a legitimate grand jury investigation was obliterated by the numerous instances of flagrant misconduct by the Attorney General in the grand jury. For example, as Judge Garrett found in dismissing the indictments, the Attorney General chose not to use the court reporter traditionally used in the grand jury but a different reporting company. (7). The reason for this move soon became clear; the prosecutor wanted to control the recording of the witnesses' testimony. As Judge Garrett found, the prosecutor had recorded only a select group of witnesses while not recording other witnesses (7). In fact, the testimony of the prosecution's most critical witness, Marty Colby, was not recorded. As every

prosecutor knows, it is the best practice to record the testimony of every grand jury witness, and it is a practice that is followed in virtually every U.S. jurisdiction. However, the Assistant Attorney General instructed the court reporter to only record the testimony of certain witnesses whom the assistant wanted recorded, and not to record the testimony of witnesses he did not want recorded. (52-3). Moreover, although grand juries typically maintain a list of witnesses who testify, no list was maintained in the TIECO case (53). And even though the testimony of a handful of witnesses was recorded, some of this testimony was recorded selectively, and inaccurately. (7).<sup>11</sup>

The deliberate failure to record the testimony of witnesses is serious misconduct. Why did the Attorney General unilaterally decide not to record Colby's grand jury testimony? In my opinion, it was because he knew how damaging to the prosecution his testimony could be, and how if recorded, could be used by the defendants to attack Colby's credibility if he testified at trial or some other legal proceeding. Colby, as the prosecutors well knew, was the most important prosecution witness. He was also, as the prosecution knew, a witness with serious credibility problems. Indeed, it should come as no surprise that several indictments were later dismissed because of Colby's lack of credibility: he initially accused other persons of stealing certain property, which was the basis for several criminal charges, whereas Colby later admitted that he possessed and converted that property himself to his own use (55-6, 61).

As every experienced trial lawyer knows, one of the most effective ways to impeach a witness is to confront that witness with prior statement that contradict his present testimony. But if a prosecutor is able to avoid the making of prior statements - by the simple expedient of not recording them as was done with Colby's grand jury testimony - then the prosecutor can effectively deny the cross-examiner the material to impeach a witness through prior inconsistent statements. The Assistant Attorney General knew that Colby was a difficult and possibly untruthful witness. In fact, before his grand jury appearance, Colby told his prosecution handlers that he did not make several statements attributed to him (55). The prosecutor knew that by recording Colby's testimony and thereby exposing its weaknesses it would significantly damage Colby's credibility and destroy much of the prosecution's case. Moreover, Colby demanded immunity at the outset of the investigation, and the prosecutor knew that exposing the issue of Colby's immunity would further damage Colby's credibility. Finally, perhaps most damaging to Colby's credibility, the prosecutor knew that after claiming that other persons stole certain property, Colby later admitted taking much if not all of the property charged in the indictment (55).

### **Grand Jury Misconduct-Presence of Third Parties Inside Grand Jury**

The record also shows that during the testimony of certain grand jury witnesses the Attorney General's investigators were present inside the grand jury room, and on occasion actually examined witnesses (56-7). One prosecutor characterized this conduct as a "mere irregularity" (58). Not so. A prosecutor who allows non-testifying persons inside a grand jury violates the rule of grand jury secrecy and constitutes prosecutorial misconduct. Numerous

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<sup>11</sup> Judge Garrett further found that the Attorney General subpoenaed witnesses into the grand jury via an Attorney General subpoena, not a grand jury subpoena as required by law (8). It is an abuse of process for a prosecutor to use an office subpoena in lieu of a grand jury or trial subpoena to summon witnesses to legal proceedings.



indictments have been dismissed for this violation, and convictions have been reversed as well.<sup>12</sup> Indeed, this is such a well-established rule that it is hard to understand the prosecutor's willingness to take the risk that his conduct would not be exposed, and the integrity of the grand jury compromised.

### **Grand Jury Misconduct-False and Misleading Testimony**

Finally, it appears that the grand jury, with the prosecutor's knowledge, received testimony that was inaccurate, misleading, or false. It appears that the grand jury relied on testimony that was skewed and defective in order to support the prosecution's theory of guilt. To the extent that the indictments rested on weak or non-existent evidence, the defendants who were indicted based on that shoddy evidence in fact may have been innocent. Colby's testimony was either inaccurate or false. Victor Hayslip, who represented Colby, testified in the grand jury and as the Eleventh Circuit wrote, "misrepresented the extent of Mr. Colby's personal involvement in the scheme."<sup>13</sup> Another witness who testified in the grand jury, James Wager, was the lead auditor for USX. He originally accused TIECO of billing USX for items it had not received. But by the time the Attorney General presented the case to the grand jury, the USX audit team had failed to locate evidence to substantiate Wager's findings.<sup>14</sup> However, Wager failed to inform the grand jury that Colby, in participating in the alleged scheme, had stolen some items from TIECO.<sup>15</sup> Indictments also were voted in connection with a theft by TIECO from another vendor, Cushman. But a witness for Cushman, Terry Waak, who was called to testify to fraudulent rebates by TIECO, told the assistant attorney general that Cushman did not believe it was a victim of any criminal conduct, and that TIECO's rebate terms were vague and subject to various interpretations. (59). The grand jury was never informed of Cushman's assertion that it did not believe it was a victim. Despite the fact that the Attorney General was aware that USX had never done an inventory of property allegedly stolen, it nevertheless presented unsubstantiated testimony that certain property had in fact been stolen (62-3). It was not until a few days before the conclusion of Judge Garrett's hearing that the Attorney General suddenly claimed to have searched the USX premises and found some of the stolen items charged in the indictments. (63).

### **Massive Discovery Violations**

Apart from the misconduct in the grand jury, the record is replete with discovery violations by the Attorney General. The rules of discovery applicable to prosecutors are clear and are central to a defendant's right to a fair trial. Any deviation by prosecutors from the rules of disclosure can only be characterized as a deliberate effort to subvert a defendant's ability to receive a fair trial. Indeed, that was exactly Judge Garrett's opinion. He found after an evidentiary hearing that the Attorney General had "repeatedly refused and failed to produce exculpatory evidence"(2); had "repeatedly denied the very existence of exculpatory evidence subsequently discovered by the Defendants" (2); "on every day of testimony the defendants have discovered evidence which should have long ago been produced" (3). Indeed, after finding the

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<sup>12</sup> See Bennett L. Gershman, Prosecutorial Misconduct (2d ed., 2016-2017 edition), §2:24, p. 95.

<sup>13</sup> *Id.* at 1284.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

existence of so many discovery violations, Judge Garrett became so outraged by the Attorney General's non-compliance with discovery orders that he issued the only "open file" discovery order that he had ever issued (11).<sup>16</sup>

### **Flaunting Judge Garret's "Open File" Discovery Order**

Several aspects of the Attorney General's discovery violations are noteworthy, and shed considerable light on Attorney General Session's commitment to justice and due process. The record is replete with evidence that assistant attorneys general repeatedly violated discovery rules with a brazen disregard for the rights of defendants, and the orders of the court. For example, as Judge Garrett observed, as the hearings continued, "it became apparent that either no one knew what was going on in the Attorney General's Office or there was a concerted effort to keep exculpatory evidence from the Defendants." (76). "Time and again an assistant AG or investigator was shown a document and forced, by the very nature of the document, to admit it was exculpatory and should have been produced." (76) Other examples show an open defiance to Judge Garrett's discovery orders. Thus, despite Judge Garrett's open file discovery order, assistants continued to disregard the order by the expedient of giving voluminous files to various investigators and then claiming that they did not possess the files and therefore did not know of any exculpatory information that might be contained in the files. Judge Garrett found this cynical effort by the Attorney General to thwart discovery unavailing; assistants, he stated, are still responsible for the information, legally and ethically (11). Other examples, among many, were noted by Judge Garrett: the Attorney General's failure to disclose that one of the alleged corporate victims believed they were not victimized by TIECO's rebate program (12); the suppression of the calendars of several of the investigators which appeared to have been falsified (12); documents in which Colby denied making statements attributed to him that were used to support the original search of TIECO (84); information that the investigator who prepared the affidavit for the search warrant and executed the warrant had made false or misleading statements in the affidavit (82-4); information that the investigator who executed the warrant was not legally authorized to do so (6, 86).

Seriously troubling to Judge Garrett was the Attorney General's motion to dismiss the USX indictments related to Colby's testimony. According to the Attorney General, the ground for the dismissal was Colby's inconsistent statements made subsequent to the indictments. However, as Judge Garrett observed, the Attorney General had been aware of Colby's misstatements for at least ten months. Why did the Attorney General wait until the end of the hearing to make the motion? Judge Garrett chastised the Attorney General's Office for its disingenuous conduct: "This Court will not allow by this action the Attorney General's Office to pick and choose as to which of the statements made by this witness they wish to believe as opposed to others which are equally incredible." (11).

### **Failed Leadership, Abuse of Power, and Failure to Serve Justice**

Finally, apart from the misconduct noted above, it is of considerable importance to evaluate the qualities of leadership, management, and commitment to justice exhibited by

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<sup>16</sup> The Attorney General appealed the order to the Court of criminal Appeals and the State's Supreme Court, both of which courts affirmed Judge Garrett's order (11).

Senator Sessions in heading the Attorney General's Office – the same qualities of leadership, management, and commitment to justice that would be expected from a potential Attorney General of the United States. Judge Garrett in dismissing the indictments expressed serious concerns about serious deficiencies in the Attorney General's Office, including the candor and truthfulness of the assistants, their devotion to fair play, and a commitment to justice. After extensive hearings exposed the serious misconduct noted above, Judge Garrett was appalled by "the completely incredible and deceptive testimony of so many witnesses this Court treated as officers of the court (some of whom were either assistants or agents for the Attorney General (2). His conclusion from examining the "very patterns of prosecutorial misconduct which exist in this case" indicates that the court "is dealing with either intentional and deliberate misconduct or conduct so reckless and improper as to constitute conscious disregard for the lawful duties of the Attorney General and the integrity and dignity of this court and this Judge"(2-3).

Instances of false or misleading representations by the Attorney General's Office were noted by Judge Garrett. For example, to support the sealing of the affidavit for the TIECO search warrant, the Attorney General claimed that the safety of persons who provided information for the affidavit would be at risk from hostile actions of the defendants. But this assertion was patently disingenuous. Persons whom the Attorney General insinuated would be capable of these hostile acts were responsible members of the community. "This case was another instance," Judge Garrett observed, "of allegations or statements made by the Attorney General's Office without regard to their accuracy." (9). Other instances of misrepresentations are notable. An assistant attorney general misled the court into believing that Colby's grand jury testimony had been recorded when it had not (75). And assistants represented that discovery had been complied with when it had not (80).

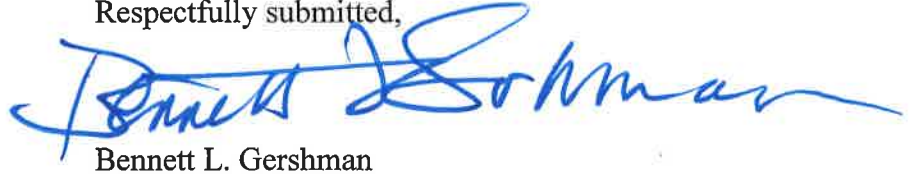
### **Conclusion**

It is understandable to claim that the dysfunctional and misguided prosecution of TIECO happened many years ago, and that it should not be revisited in order to assail Senator Sessions' relatively brief tenure as Alabama's Attorney General. However, the TIECO case was not just some other case of little moment. As noted, it was billed as the case of greatest magnitude in Sessions' prosecutorial career, and therefore would appear to be of some relevance in seeking insight into how Senator Sessions might supervise and administer the Office of the Attorney General of the United States. In examining the TIECO case one might be able to learn about the skills and values that Senator Sessions, as Alabama's Attorney General, sought to instill in his assistants and investigators. Given the importance of the TIECO case, and the promotion of that case as a significant effort to prosecute white collar crime and business fraud, there is a very strong likelihood that Senator Sessions was newly involved in the case, and was aware there would be significant rewards for him and his office politically in a successful prosecution.

Based on my review of the instant case, and my review of Judge Garrett's decision as well as the other litigation materials in the case, it is my professional opinion that Senator Sessions, as the chief law enforcement officer in the State of Alabama, together with his assistants and investigators, engaged in a pattern of flagrant, willful, and repeated misconduct which undermined the integrity of the criminal justice system, harmed the reputations of entities

and individuals who were wrongfully accused of criminal conduct, and violated the constitutional and ethical duties of a prosecutor to serve the cause of justice fairly, and the administration of the criminal law with dignity and respect. His conduct in the TIECO case, in my opinion, disqualified him from being confirmed Attorney General of the United States.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Bennett L. Gershman", is written over the typed name. The signature is fluid and cursive, with a large initial "B" and a long, sweeping underline.

Bennett L. Gershman