NO:

In the Supreme Court of the United States

ALI SHAYGAN,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Government is exempted as a matter of law for Hyde Amendment sanctions under the statute's prohibition on "bad faith" prosecutions despite subjective malice in its filing decision and extensive and pervasive prosecutorial misconduct during the course of the litigation, merely because there was probable cause to support the filing of the indictment.

PARTIES BELOW

In addition to the parties set forth in the caption, the following individuals were parties to the Eleventh Circuit proceedings:

Cronin, Sean Paul, Appellant

Hoffman, Andrea G., Appellant

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PETITION FOR WRIT OF CERTIORARI

Dr. Ali Shaygan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *United States v. Ali Shaygan*, 652 F.3d 1297 (Case No. 09-12129, 11th Cir. 2011).

OPINIONS BELOW

This petition seeks review of a decision of the United States Court of Appeals for the Eleventh Circuit, which vacated the order of the United States District Court for the Southern District of Florida imposing Hyde Amendment sanctions. Other relevant opinions are the dissent to the Eleventh Circuit panel opinion; the denial of rehearing en banc, including the dissent to denial of rehearing en banc and the response to the dissent; and the district court's order imposing sanctions. All of these opinions are included in the Appendix.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. This petition is timely filed pursuant to SUP. CT. R. 13.1 and 13.3. The Eleventh Circuit's order denying Petitioner

Shaygan's petition for rehearing en banc was entered on April 10, 2012.

STATUTORY PROVISION INVOLVED

Petitioner relies upon the statutory provision known as the Hyde Amendment, which is found as a statutory note to 18 U.S.C. § 3006A. It states as follows:

> [T]he court, in any criminal case . . . pending on or after the date of the enactment of this Act [Nov. 26, 1997], may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, **where the court finds that the position of the United States was vexatious, frivolous, or in bad faith**, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. . . . Pub.L. No. 105–119, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes) (emphasis added).

STATEMENT OF THE CASE

A. INTRODUCTION

In a sharply divided 2-1 panel decision squarely in conflict with other circuits, the Eleventh Circuit has virtually inoculated the federal government against liability under the Hyde Amendment for even the most egregious instances of prosecutorial misconduct. The Hyde Amendment was enacted precisely to give the judiciary a tool to curtail prosecutorial misconduct manifesting in bad faith and vexatious prosecutions. Yet the majority in this timely, high-stakes case determined that no Hyde Amendment liability can exist as a matter of law provided that there was probable cause to support the filing of the charges in question.

The panel's decision was far from unanimous. In a vigorous dissent asserting that the district court's sanctions award should have been upheld, Judge Edmondson "submit[ted] that it is, in part, for these pushing-around cases – the misuse of the browbeating dominance that can come from holding a prosecutorial office – for which the phrase 'or in bad faith' was enacted into law in what is called the Hyde Amendment." Appx. 50. And in a strongly worded dissent from the failure to grant *en banc* review, Judges Martin and Barkett argued that the panel opinion "rewrites the statute" with an "astoundingly narrow reading" which "collapses the Hyde Amendment inquiry into only a single question" and "makes an unwarranted departure from the decisions

of [the other] Circuits and from Supreme Court precedent." Appx. 170-171.

The intensity of these dissents is unsurprising given the significance and timeliness of the issue at stake. The panel decision, which is at odds with existing precedent in multiple other circuits, addresses a matter that has grabbed national attention in recent years and generates headlines on a daily basis. Yet despite recognition from all corners (conservative and liberal alike) that the problem of prosecutorial misconduct must be addressed, the panel opinion wrests one of the few remaining tools from the judiciary's arsenal. As Judge Martin explains, the *Shaygan* opinion "strips our federal trial judges of a rarely needed, but critical tool for deterring and punishing prosecutorial misconduct. And the prosecutorial misconduct that happened in Dr. Shaygan's case deserved punishment." Appx. 163.

This case presents a pure legal question of statutory construction and offers this Court the ideal vehicle to clarify the import and application of the 1997 Hyde Amendment, which has been addressed repeatedly in the lower courts since its enactment 15 years ago but has yet to receive the attention of this Court.

B. COURSE OF PROCEEDINGS

On February 8, 2008, the United States filed a 23-count indictment against Dr. Ali Shaygan, alleging that Dr. Shaygan distributed and dispensed controlled

substances outside the scope of professional practice and not for a legitimate medical purpose, in violation of 21 U.S.C. § 841(a)(1). DE3. Although the original indictment was "not frivolous or commenced in bad faith," Appx. 131, "the prosecution of Dr. Shaygan ran into problems, and the prosecutors responded with tough tactics that deteriorated into disobeying Court Orders, hiding evidence, and shirking of longstanding obligations imposed upon federal prosecutors." Appx. 164.

After extremely contentious litigation and the prosecution's threat of a "seismic shift" if the defense pursued a meritorious motion to suppress, the Government superceded the indictment on September 26, 2008, adding 118 counts. DE124.

In the middle of the three week trial on the 141-count superseding indictment, a Government witness blurted out during his testimony that he had recorded conversations with the lead defense attorney. Four days later, the Government revealed that this witness and another had made surreptitious recordings of the defense team at the line prosecutor's instruction and for the prosecutor's use. The taping of the defense was done without proper authorization by either the U.S. Attorney or the court in violation of Department of Justice policy. The district court expressed substantial concern about this revelation, and advised that it would continue with the trial and take up the issue subsequent to the verdict.

In a matter of hours, the jury returned a verdict

acquitting Dr. Shaygan of all 141 counts. Appx. 66.

Immediately thereafter, the district court ordered the parties to brief whether Hyde Amendment or other sanctions were appropriate as a result of the prosecutors' wrongful actions. The district court then held a two day evidentiary hearing at which it permitted the government and Shaygan to call witnesses and make argument. The district court specifically ordered the individual prosecutors to submit affidavits detailing their version of events, and to be present and available to testify during the hearing. DE302:226; DE250; DE324:239-40; DE275.

During the course of proceedings, overwhelming evidence of prosecutorial misconduct dating back to the filing of the superceding indictment was revealed.

Ultimately, the district court entered a 50-page order, "crowded with thorough findings of fact" (Appx. 62) on 21 single-spaced pages,[1] delineating serious

[1] As the *en banc* dissent recites, "Judge Gold's fifty-page Order makes so many findings that it is not practical to set them all out here." Appx. 176. The District Court's undisturbed findings are included in the Appendix at pgs. 69-112. The details of the extensive misconduct also are presented at length in the Answer Brief of the Appellee Ali Shaygan to the Eleventh Circuit, at pgs. 8 to 36. The district court's factual findings, which were developed in support of the Hyde Amendment sanctions with undisputed abundant notice and due process to the Government,

"conscious and deliberate wrongs" by the U.S. Attorney's Office, including that the Government:

- threatened the defense that if it proceeded with a motion to suppress there would be a "seismic shift" in the prosecution;

- superseded the indictment and added over 100 counts "significantly motivated by ill-will" because the defense proceeded with the motion to suppress and the motion was granted, in order to increase the time and cost of the trial and thereby compel a guilty plea;[2]

- based on personal animus, secretly taped the defense lawyer and investigator unlawfully and

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were not disturbed by the panel which determined that it "need not decide whether the finding that the filing of the superseding indictment was motivated by subjective ill-will is clearly erroneous." Appx. 25. *See also* Appx. 26 ("We need not decide these issues").

[2] The district court, in detailing the purposeful, tactical, and malicious behavior behind the prosecution, explained that "the effect of the Superseding Indictment was to greatly increase the time and cost of the trial. The adding of 118 more counts resulted in the defense having to request additional continuances which kept Dr. Shaygan under strict conditions of house arrest. It also added to the 'weight' of the indictment and the seriousness of the offenses as presented to the jury."Appx. 82.

without cause while they interviewed witnesses, pursuant to an undisclosed confidential informant agreement;

- failed to turn over exculpatory information to the defense, repeatedly violating *Brady, Giglio* and *Jencks*;

- disobeyed multiple court orders;

- twisted the words of witnesses;

- asked the magistrate judge to engage in unethical deception of the defense and the public;[3]

- prosecuted the case with a win-at-all-costs attitude, including withholding from the judge, jury, and defense that two of its witnesses were actually confidential informants and not neutral witnesses;

- revealed the improper taping of defense counsel only after the witness referenced it on the stand, and only after a supervisor "by accident" heard the line prosecutors retelling the story of the witness's testimony during a social dinner

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[3]The Magistrate Judge issued an order during the pretrial phase of the case, explaining that the Government had asked the court, in a sealed pleading "to engage in deception" of both the defense and the public. DE103:3.

with friends that evening; and

- lied at the evidentiary hearing addressing the misconduct.

The district court explained that these were not isolated wrongs but fit into a "pattern" of desperate conduct designed to save a case that had become weak from getting even weaker. Appx. 170.

The district court concluded, "without doubt," Appx. 68, that the Government engaged in "conscious and deliberate wrongs that arose from the prosecutors' moral obliquity and egregious departures from the ethical standards to which prosecutors are held." Appx. 132. The Shaygan prosecutors "exhibited a pattern of 'win-at-all-cost' behavior ... that was contrary to their ethical obligations as prosecutors and a breach of their 'heavy obligation to the accused.'" Appx. 168.

Both in the multiple papers filed by the Government and at the hearing, the Government consistently and repeatedly admitted liability under the Hyde Amendment because of its "serious failings," and contested only whether the award should extend back to the date of the superseding indictment or apply solely to the improper collateral investigation of the defense team. DE258, 270, 299, DE290:13-15, 76, 197-98. Indeed, the Government went so far as to "waive any legal defenses pursuant to the Hyde Amendment, and thus not contest payment pursuant to the Hyde Amendment, of the defendant's attorneys'

fees and costs associated with litigating the motions to dismiss and for sanctions." DE299 at 5. *See also* DE299 at 13 ("[T]he United States Attorney, on behalf of the Government, and only with respect to the collateral investigation, waives legal defenses pursuant to the Hyde Amendment, and thus stands prepared to pay, *pursuant to the Hyde Amendment*, the defendant's attorneys' fees and costs associated with litigating the motions to dismiss and for sanctions.") (emphasis added).

The district court awarded Dr. Shaygan his attorneys' fees and costs from the date of the superseding indictment, which it found was both filed and litigated in bad faith. The district court also reprimanded three prosecutors.[4]

The Government and two of the prosecutors appealed, asserting jurisdiction under 28 U.S.C. § 1291. The Government once again acknowledged substantial errors in its handling of Dr. Shaygan's prosecution, and conceded that the "Hyde Amendment award can be sustained" if "the superseding indictment was filed in bad faith." Opening Brief for

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[4] The panel opinion vacated these reprimands based on its findings that the individual prosecutors were not afforded due process (despite the more-than-ample notice that their conduct was at issue and that any and all sanctions were on the table), and remanded for further proceedings on the reprimand issue only. The panel's decision to vacate the reprimands is not at issue in this petition.

the United States (Appellant) at 48. The Government contended that the district court clearly erred in concluding *as a matter of fact* that the superseding indictment was brought in bad faith, but did not argue that Hyde Amendment sanctions were precluded as a matter of law under the "bad faith" prong merely because there was probable cause to support the charges.[5]

Nonetheless, the 2-1 majority found that "even if the filing of the superseding indictment was subjectively motivated by ill-will," Hyde Amendment sanctions could not be awarded. It concluded that if a prosecution is "objectively reasonable, as was the case here, then a district court has no discretion to award a prevailing defendant attorney's fees and costs under the Hyde Amendment." Appx. 40. The court excused the Government from liability because "regardless of [the prosecutor's] displeasure or subjective ill-will, the Government had an objectively reasonable basis for

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[5] The Government drew a contrast between the "bad faith" prong of the Hyde Amendment (which it acknowledged requires an analysis of the Government's "position" during the conduct of the litigation and not merely on the objective viability of the initial charges), and the "vexatious" prong of the Hyde Amendment (which it contended is dependent on a showing that the Government did not have reasonable or probable cause to support the charges in the first instance). Government's Opening Brief at 36-43. In other words, the Government argued to the Eleventh Circuit the precise position that Dr. Shaygan asserts herein.

superseding the indictment" in the form of sufficient evidence to support the superseding indictment. Appx. 41.

Judge Edmondson dissented, aptly summing up the issues as follows:

> This appeal presents a question of statutory construction: what is the significance of the words 'or in bad faith' in the Hyde Amendment? I dissent and write separately because I believe that the phrase 'or in bad faith' covers, and was intended to cover, prosecutorial positions beyond those positions that are baseless or exceed constitutional constraints: the limit that today's Court imposes.

Appx. 45. Judge Edmondson reasoned that "[w]e must not take the word 'or' out of the statute by reading 'in bad faith' as meaning the same thing as either 'vexatious' or 'frivolous.'" Appx. 47.

Dr. Shaygan petitioned for rehearing *en banc*. The petition was denied, "[t]he court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it." Appx. 145. Judge Martin, joined by Judge Barkett, issued a strong dissenting opinion in which she pointed out that the Eleventh Circuit "stands alone in its now established rule that in order to discern 'the

position of the United States,' a court need only examine the basis for the charges." Appx. 173. Judge Pryor responded to the dissent, offering further argument in support of the panel decision and reiterating that the panel "did not need to decide whether the findings of alleged misconduct as they related to the award of fees under the Hyde Amendment were clearly erroneous" because "even if true, [the findings] could not constitute 'the position of the United States.'" Appx. 153.

This timely petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

As the Eleventh Circuit observes at the outset of its opinion, "[t]he stakes in this appeal are high: they involve the sovereign immunity of the United States, the constitutional separation of powers, and the civil rights and professional reputations of two federal prosecutors." Appx. 2. Of course, the court's catalog of interests is incomplete, as it rather peculiarly omits several significant stakes that are directly at issue: the rights of criminal defendants to be protected against malicious, bad faith prosecutions; and the interests of the judicial branch in preserving the integrity of the courtroom and in obtaining compliance with its orders and the laws of the United States.

The majority's holding regarding the meaning of the Hyde Amendment is squarely in conflict with the law of several other circuits and contravenes precedent of this Court. The holding does violence to the plain language of the statute in an important area of the law in which nationwide uniformity is particularly critical. Because this case presents a pure question of law, it is an ideal vehicle in which to resolve the question presented.

I. The Eleventh Circuit's Holding Is Inconsistent With The Plain Meaning Of The Hyde Amendment.

Judge Edmondson explained in his panel dissent that "[t]his appeal presents a question of

statutory construction: what is the significance of the words 'or in bad faith.'" Appx. 44.

The Hyde Amendment is straightforward: it allows for district judges to award reasonable fees and expenses "where the court finds that the position of the United States was vexatious, frivolous, **or** in bad faith." Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes) (emphasis added). Yet the opinion below holds that even when proceeding under the "bad faith" prong of the Hyde Amendment, sanctions are appropriate only if the charging decision was "objectively unreasonable." Appx. 4, 29, 32, 63.

As applied by the Eleventh Circuit, an "objectively unreasonable" prosecution is the same as a "frivolous" one. But given that "frivolous" prosecutions are separately prohibited by the Hyde Amendment, the panel has effectively written the words "**or** in bad faith" out of the statute. Appx. 47-48. *See also* Appx. 163 ("[T]he opinion rewrites the statute by limiting the term 'the position of the United States' to mean only the basis for bringing charges."). As succinctly summarized in the dissent to the denial of *en banc* review, the majority's

> astoundingly narrow reading of the term 'the position of the United States' collapses the Hyde Amendment inquiry into only a single question: were the charges against the defendant baseless? If the answer to that question is no, then

> 'the prosecution is objectively reasonable,' and the Hyde Amendment inquiry comes to an abrupt halt.

Appx. 170. The question before this Court is whether the Eleventh Circuit correctly determined that recovery under the "bad faith" prong of the Hyde Amendment turns on the answer to that single question.

The plain language of the statute establishes that bad faith means more than just the absence of probable cause. As the dissent to the panel opinion states,

> I understand this 'state of mind' element to mean that the 'in bad faith' standard is essentially a question of fact about the federal prosecutor's subjective intent as he drove a prosecution forward. From the statute's text itself, I also understand the word 'or' in the phrase 'or in bad faith' to mean that 'in bad faith' is a complete alternative basis to support an award of attorney's fees and other litigation expenses. So, it is unimportant that a prosecution was not 'vexatious' and was not 'frivolous': put differently, it is not decisive under the statute that a criminal prosecution was conducted in an objectively reasonable way (not vexatious) and that the prosecution had an objectively realistic

> likelihood of success (not frivolous). Congress, by adding the phrase 'or in bad faith,' was looking beyond litigation positions that were either vexatious or frivolous and addressing something different.[6] Appx. 46-47.

Indeed, if Congress had wanted the Hyde Amendment to apply solely to cases lacking probable cause, it would have been quite simple for it to have said so directly. Yet Congress did not do so; instead it set forth three separate, independent bases for a Hyde Amendment award. Each of these three bases must be given meaning. *See, e.g.,* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) (discussing "the Surplusage Canon" which explains that every word and every provision is to be given effect, none should be ignored, and none should needlessly be given an interpretation that causes it to duplicate another provision or to have no

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[6] The majority's response to the well-aimed criticism that its opinion conflates bad faith conduct with frivolous and vexatious conduct only bolsters the accusation to which it purports to respond: "In the light of the evidence that supported the superseding indictment, the charges against Shaygan were not objectively filed in bad faith; the Government did not knowingly or recklessly pursue a frivolous claim or exceed any constitutional constraint." Appx. 42 (internal quotations omitted). In other words, in the Eleventh Circuit, a defendant must prove frivolousness to satisfy the bad faith requirement.

consequence). Courts "must not take the word 'or' out of the statute by reading 'in bad faith' as meaning the same thing as either 'vexatious' or 'frivolous.'" Appx. 47.

The legislative history of the Hyde Amendment supports this plain reading of the statute. In addressing the need for the legislation bearing his name, Congressman Hyde said: "People do get pushed around, and they can get pushed around by their Government." 143 Cong. Rec. H7786-04, H7791 (Sept. 24, 1997). As the dissent to the panel opinion argues, "[w]here a prosecution is "driven along by things like personal ambition, personal vindictiveness, or politics . . . Congress intended those prosecutorial positions to be included within the 'or in bad faith' standard of the Hyde Amendment." Appx. 48. *See also United States v. Gilbert*, 198 F.3d 1293, 1304 (11th Cir. 1999) (quoting 143 Cong. Rec. H7786-04, H7791 (Sept. 24, 1997)) (statute is "targeted at prosecutorial misconduct . . . [such as] keeping information from [the defendant] that the law says [the Government] must disclose, hiding information, not disclosing exculpatory information and suborning perjury.").

As Judge Martin explained: "the opinion rewrites the statute by limiting the term 'the position of the United States' to mean only the basis for bringing charges. The statute will now be enforced in [the Eleventh Circuit] in a way that places precisely the type of prosecutorial misconduct Congressman Hyde highlighted as motivating passage of the Hyde Amendment beyond its scope." Appx. 163.

II. The Court Below Created A Rule Of Law That Conflicts With A Prior Ruling Of This Court.

The *Shaygan* court's definition of the term "position of the United States" conflicts with this Court's prior decision regarding that same term. *See* Appx. 171-172 (citing *Commissioner, INS v. Jean,* 496 U.S. 154 (1990)).

As the Eleventh Circuit has acknowledged, the Hyde Amendment was patterned after the Equal Access to Justice Act (the "EAJA"), which awards attorneys' fees to litigants who prevail against the United States in civil cases in which the Government's "position" is not substantially justified. *See United States v. Gilbert*, 198 F.3d 1293, 1300 (11th Cir. 1999); 28 U.S.C. § 2412(d)(1)(A). In *Commissioner, INS v. Jean*, this Court defined the term "position of the United States," as it is used in the EAJA, to mean the "case as an inclusive whole." 496 U.S. 154, 161-62 (1990). This Court expressly found that the term position "may encompass both the agency's prelitigation conduct *and the Department of Justice's subsequent litigation positions,"* such that "one threshold determination for the *entire civil action* is to be made." *Id.* at 159 (emphasis added).

Congressman Hyde later adopted this same term, subject to this Court's interpretation, for use in the legislation bearing his name. Yet in redefining the term "position of the United States" with a laser focus solely on the charging decision, the Eleventh

Circuit improperly disregarded this Court's prior guidance. This Court's doubly-emphatic use of the terms "inclusive" and "whole" directed courts to make a substantially broader inquiry than the snapshot view permitted by the 2-1 panel decision.

III. The *Shaygan* opinion created a split in the Circuits regarding the meaning of the Hyde Amendment.

The Eleventh Circuit's interpretation not only conflicts with a prior decision of this Court and the plain text and legislative history of the statute, it also is at odds with the other Circuits and district courts that have addressed the meaning of the Hyde Amendment.

As the dissent to the denial of *en banc* review makes clear, the Eleventh Circuit's opinion "marks an unwarranted departure from the decisions of [the] sister Circuits." Appx. 171. The Eleventh Circuit's conclusion that the Hyde Amendment is concerned only with the objective reasonableness of charges stands in stark contrast to opinions from the Second, Eighth, and Ninth Circuit Courts of Appeal, each of which have recognized that a Hyde Amendment bad faith inquiry properly looks beyond the existence of probable cause to consider post-indictment prosecutorial misconduct. It also is inconsistent with holdings from the First and Sixth Circuits and district

courts from other circuits.[7]

In *United States v. Schneider*, 395 F.3d 78 (2d Cir. 2005), the Second Circuit evaluated the Government's post-indictment conduct, finding that it did not rise to the level of personal animus or dishonesty necessary to support a bad-faith Hyde Amendment award. *Id.* at 88. *See also United States v. Mitselmakher*, 2008 WL 5068609 (E.D.N.Y. 2008), at *10-11, *aff'd,* 347 Fed. Appx. 649 (2d Cir. 2009) (looking to Government's conduct during prosecution of case to evaluate Hyde Amendment bad faith claim).

In *United States v. Porchay*, 533 F.3d 704 (8th Cir. 2008), the Eighth Circuit considered the Government's post-indictment conduct and rejected the defendant's claim under the Hyde Amendment's bad faith prong as a matter of fact, but not as a matter of law. *Id.* at 711. Significantly, the Eighth Circuit drew a distinction between the bad faith prong and the frivolous and vexatious prongs, determining that the analysis for frivolous or vexatious prosecutions—but not bad faith prosecutions—turned on the existence of probable cause to proceed with charges.

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[7] Despite the fact that each of these circuits has held that malice in the charging decision and the Government's post-indictment conduct is relevant as a matter of law to a Hyde Amendment inquiry, not one of the cited cases under the particular facts merited an award of sanctions. Even under the correct standard applied by the majority of circuits, the bar to Hyde Amendment sanctions is extremely high.

Id.

And in *United States v. Manchester Farming Partnership*, 315 F.3d 1176 (9th Cir. 2003), the Ninth Circuit evaluated the Government's post-indictment conduct in detail to determine whether the Government had acted with a "state of mind of ill will, []or furtive design." *Id.* at 1185-86. Like the Eighth Circuit, the Ninth Circuit did not rely upon the existence of probable cause as determinative under the bad faith prong, instead considering that factor as relevant to the analysis of frivolity or vexatiousness. *Id.* at 1183-86.

In addition to these three circuit court opinions, there are several district court opinions from other circuits that conflict with *Shaygan*, each of which look to the Government's ongoing conduct of the litigation, and not the existence of probable cause, when evaluating a Hyde Amendment claim of bad faith. *See United States v. Ranger Electronics, Inc.,* 22 F. Supp. 2d 667 (W.D. Mich. 1998), *rev'd on other grounds*, 210 F.3d 627 (6th Cir. 2000) (finding that prosecutors acted in "bad faith" under Hyde Amendment for withholding *Brady* and *Giglio* information); *United States v. Von Schlieffen,* 2009 WL 577720 (S.D. Fla. 2009) (holding that prosecutors acted in "bad faith" under Hyde Amendment where the Government "[f]ailed to monitor the informants" and "fail[ed] to disclose what it knew and had a duty to know about the informants"); *United States v. Erwin,* 2010 WL 1816349, No. CR-08-33-FHS, at *4 (E.D. Ok. 2010) (finding that no bad faith was shown given that the

Government's post-indictment conduct did not demonstrate the "conscious doing of a wrong because of dishonest purpose or moral obliquity"); *United States v. Harris*, 2008 WL 6722775, at *2 (N.D.W.Va. 2008) (denying Hyde Amendment sanctions because the allegations suggested only "trivial" episodes of post-indictment bad faith conduct that did not "rise to the requisite level to constitute 'bad faith.'"); *United States v. Brvenik*, 487 F. Supp. 2d 625, 631-32 (D. Md. 2007) (finding that no bad faith was shown given that the Government's post-indictment conduct was not motivated by evil purpose or ill will).

Two other circuits addressed the nature of the Hyde Amendment inquiry in the context of defining the terms "vexatious" and "frivolous." In *United States v. Knott*, 256 F.2d 20 (1st Cir. 2001), the First Circuit expressly rejected the idea that a Hyde Amendment review focuses solely on the evidentiary basis for the charges, instead holding that a finding of vexatiousness requires an inquiry into "whether the Government's conduct, when viewed objectively, manifests, or is tantamount to, malice or an intent to harass or annoy." *Id.* at 30-31. And it stated that "it is permissible for courts to consider the conduct of the investigation in order to provide a context in which to assess whether a prosecution was 'vexatious' within the terms of the Hyde Amendment." *Id.* at 31.

The meaning of a "frivolous" prosecution was addressed in *United States v. Heavrin*, 330 F.3d 723 (6th Cir. 2003), in which the Sixth Circuit concluded that the Government's "position" referred to "the case

as an inclusive whole," which necessarily encompasses far more than just a probable cause inquiry. *Id.* at 730. The Sixth Circuit rejected the idea that the Government's "position" could be defined as frivolous for some counts and not others. But it also established that "[e]valuating a case as an inclusive whole is not susceptible to a precise litmus test," and that the district court "must not fail to see the forest for the trees." *Id.*

Uniformity amongst circuits is always a matter that merits the attention of this Court, but this is especially so in the context of this case. The Hyde Amendment applies in every circuit to the conduct of the exact same entity—the United States Department of Justice—and as such should be applied consistently throughout the country. When there is a rogue prosecution anywhere in the country, it undermines the integrity of our entire criminal justice system. Prosecutorial misconduct is not a local issue.

IV. The Question Presented Is Of Substantial National Importance.

Though the Eleventh Circuit's holding led to "a particularly shocking result in this case," Appx. 173, the manifest significance of this case is not its application to the prosecution of Dr. Ali Shaygan. It is in the majority's sweeping revision of the Hyde Amendment which converts what was intended to be a "system of check and balances to protect against prosecutorial misconduct," Appx.162, into a simple referendum on the existence of probable cause.

This fundamental alteration of one of the few tools to address prosecutorial misconduct is particularly ill-advised given that the problem of prosecutorial misconduct is significant and continues to draw substantial nationwide attention. In addition to the high profile examples of the Ted Stevens case and the Duke Lacrosse case, there have been a slew of cases across the country making news each and every day. While the incidence of prosecutorial misconduct on a percentage basis is very small and most prosecutors pursue their duties ethically, these rogue prosecutions have a disproportionate impact on the actual and perceived ability to deliver justice in our courts of law.

Yet despite the significance of the problem, our system of justice offers few remedies. Civil litigation against misbehaving prosecutors is largely foreclosed. *See, e.g., Connick v. Thompson*, 563 U.S. __, 131 S. Ct. 1350 (2011). And internal disciplinary proceedings are inadequate and insufficient to address the problem. As set forth in detail by the Yale Law Journal online, "professional responsibility measures as they are currently composed do a poor job of policing prosecutorial misconduct." David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After* Connick v. Thompson: *Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 Yale L.J. Online 203 (2011), http://yalelawjournal.org/2011/10/25

/keenan.html.[8]

The panel opinion suggests that Dr. Shaygan got his remedy for the Government's misconduct in the form of an acquittal. *See* Appx. 36. This represents a fundamental misunderstanding of the record; Dr. Shaygan was acquitted *in spite of* the Government's misconduct, not *because of* it. Appx. 123. Indeed, the panel's argument underscores the very real need for a remedy in a case such as this in which a defendant, already tainted by the fact of

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[8] As reported in this article, a study conducted by the Innocence Project found that although there were 91 Texas cases between 2004 and 2008 in which Texas judges found that prosecutors committed misconduct (19 of which resulted in the reversal of a conviction), *not one* of these cases resulted in public discipline by the Texas Bar Association. Similarly, a California study showed that over a 10-year period involving 159 reversals of conviction due to prosecutorial misconduct, not one case was referred by judges to the California State Bar. As the article succinctly concludes, "[t]his data surely undermine[s] public confidence that the system designed to sanction prosecutors who ignore their legal and ethical obligations is not working as it should." *See also* Amicus Brief of the American Civil Liberties Union in support of Ali Shaygan before the Eleventh Circuit at pgs. 23-29 (detailing that the Department of Justice Office of Professional Responsibility cannot be relied on to punish misbehaving prosecutors because it often rejects findings made by judges).

having been prosecuted, is deprived of the vindication of a not guilty verdict by way of the suggestion that he "got off" only because the Government misbehaved.[9]

As a result of the inadequacy of other remedies, the availability of the Hyde Amendment is a critical tool in the judge's arsenal to address egregious cases of prosecutorial misconduct during the course of the litigation. Indeed, other than the outright dismissal of a case, it is perhaps the *only* meaningful mechanism by which a judge can protect the integrity of his or her courtroom. The Eleventh Circuit's interpretation of the Hyde Amendment is unacceptable, as it is "dangerous to render trial judges mere spectators of extreme Government misconduct." Appx. 174. Contrary to the panel's suggestion that its holding protects the "separation of powers," the very opposite is true: the panel decision fundamentally alters the checks and balances between the judiciary and the executive, stripping trial judges of the ability to control their courtrooms and to demand moral and ethical behavior from prosecutors. "[I]t is the

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[9] Curiously, while the panel opinion offers only a narrow glimpse into the substantial and highly relevant evidence regarding Governmental misconduct, it engages in a lengthy and entirely irrelevant discussion of the merits of the prosecution case (in the light decidedly most favorable to the Government). Appx. 5-6, 12-16. The panel's lengthy presentation of the prosecution case is followed by just two conclusory sentences stating generically that Shaygan put on a defense case. Appx. 16.

instances of the treating of the Department of Justice and its prosecutors differently from – and better than – other litigants that threaten the separation of powers between the Judicial Branch and the Executive Branch." Appx. 62.

It is important to note that in every other circuit, which permits recovery for instances of substantial subjective bad faith conduct during the course of the prosecution, the floodgates have not opened. In those circuits that have defined bad faith differently, there are strikingly few Hyde Amendment awards. The standard is still exceedingly high. But the standard should not be so high as to be insurmountable. "No good reason exists to believe that United States District Judges are going to make awards under the Hyde Amendment lightly. I also think the facts of prosecutorial misconduct in this case —as found by the District Judge—are exceptionally troubling: I do not believe we will often see cases involving fact-findings for this sort of extensively manifested prosecutorial ill will toward the defendant and defense lawyers." Appx. 59-60.

V. This Case Offers The Ideal Vehicle With Which To Decide The Hyde Amendment's Reach.

This case presents the Court with the opportunity to consider the Hyde Amendment's reach and application through a focused inquiry that gets directly to the heart of the statute.

The question presented to this Court is a pure question of law that does not depend in any way on the correctness of the district court's factual findings. The majority below expressly determined that because it decided the case with a blanket conclusion of law foreclosing recovery regardless of the extent of subjective malice and ill-will, it "need not decide whether the finding that the filing of the superseding indictment was motivated by subjective ill-will is clearly erroneous." Appx. 25-26.

Moreover, because the Eleventh Circuit's holding collapses the three separate prohibitions of the Hyde Amendment against frivolous, vexatious, and bad faith prosecutions into one analysis, this case permits the Court to clarify the meaning of each of these prohibitions.

CONCLUSION

This case presents the Court with the opportunity to address an important issue with nationwide implications. The Eleventh Circuit's holding, which conflicts with a prior holding of this Court and the law of other circuits, frames a pure question of law that is ripe for certiorari review.

As Judge Martin concluded:

> The rules that govern our criminal justice system have developed over the life of our country to allow those accused of crimes

> to know the evidence against them; to be advised of the weaknesses in that evidence; and to be able to confront the witnesses against them with full knowledge of information which might color their testimony. Just like the rest of us, Dr. Shaygan was constitutionally entitled to all of this as he faced the serious charges leveled against him. The Government violated Dr. Shaygan's rights, and now, contrary to what Congress has provided, he is left alone to pay the costs he suffered at the hands of these rule breakers. Appx. 174.

We respectfully request that the Court grant the writ of certiorari.

Miami, Florida
July 2012

Respectfully submitted,

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United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellant,
Andrea G. Hoffman, Sean Paul Cronin,
Interested–Parties–Appellants,
v.
Ali SHAYGAN, Defendant–Appellee.

No. 09–12129.

Aug. 29, 2011.

Robert C. Josefsberg, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Anne R. Schultz, Asst. U.S. Atty., Laura Thomas Rivero, Miami, FL, Roberto Martinez, Maureen Elizabeth Lefebvre, Susan Tarbe, Colson, Hicks, Eidson, Coral Gables, FL, Kirby A. Heller, Washington, DC, for Appellants.

David O. Markus, David Oscar Markus, PLLC, Miami, FL, for Appellee.

G. Richard Strafer, G. Richard Strafer, P.A., Miami, FL, for American Civil Liberties Union of Florida, amicus curiae.

H. Scott Fingerhut, Miami, FL, for National Association of Criminal Defense Lawyers, amicus curiae.

Appeals from the United States District Court for the Southern District of Florida.

Before EDMONDSON, PRYOR and BARKSDALE,[FN*] Circuit Judges.

> FN* Honorable Rhesa H. Barksdale, United States Circuit Judge for the Fifth Circuit, sitting by designation.

PRYOR, Circuit Judge:

The stakes in this appeal are high: they involve the sovereign immunity of the United States, the constitutional separation of powers, and the civil rights and professional reputations of two federal prosecutors. The United States appeals an award of $601,795.88 in attorney's fees and costs under the Hyde Amendment, Pub.L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes), and two attorneys, Sean Cronin and Andrea Hoffman, appeal public reprimands entered against them based on their work as Assistant United States Attorneys in an underlying criminal action marked by hard adversarial tactics. A grand jury indicted Dr. Ali Shaygan for distributing and dispensing controlled substances outside the scope of professional practice, 21 U.S.C. § 841(a)(1). The Drug Enforcement Administration had conducted an undercover investigation of Shaygan after one of his patients died from a lethal combination of prescription and illegal drugs. After Shaygan's arrest, the government discovered additional evidence of violations of federal law, and Shaygan moved to

suppress statements he had made to federal agents who, Shaygan contended, had violated his right to counsel. In response to that motion, Cronin warned Shaygan's lead counsel of an impending "seismic shift" in the prosecution of Shaygan. Soon afterward, the government filed a superseding indictment with additional charges and supported those charges at trial with the testimony of several witnesses and documentary evidence. Near the end of trial, the district court allowed a second cross-examination of two witnesses for the government after it came to light that those witnesses had cooperated in a collateral investigation about potential witness tampering by members of the defense team. The district court instructed the jury that the reopening of cross-examination was necessary to address misconduct by the government. In closing argument, Shaygan's counsel compared that alleged misconduct to the Salem witch trials. After the jury acquitted Shaygan of all charges, the district court held an inquiry about sanctions under the Hyde Amendment. The district court found that the prosecutors "acted vexatiously and in bad faith in prosecuting Dr. Shaygan for events occurring after the original indictment was filed." The district court awarded Shaygan attorney's fees and costs, publicly reprimanded Cronin and Hoffman, and referred those attorneys to disciplinary authorities.

The United States, Cronin, and Hoffman contend that the district court abused its discretion and committed fundamental errors. The United States argues that the district court erroneously ruled that the superseding indictment was "brought vexatiously,

in bad faith, or so utterly without foundation in law or fact as to be frivolous," United States v. Gilbert, 198 F.3d 1293, 1299 (11th Cir.1999), and that the district court erroneously concluded that an award of attorney's fees and costs under the Hyde Amendment could be supported by discrete incidents of bad faith, such as discovery violations, without regard to the overall litigating position of the United States. Cronin and Hoffman argue that the district court violated their right to due process, under the Fifth Amendment, when it denied them notice and an opportunity to be heard before it entered public reprimands of them.

We agree with these arguments. The district court abused its discretion when it imposed sanctions against the United States for a prosecution that was objectively reasonable, and the district court violated the constitutional right to due process of the two lead prosecutors, Cronin and Hoffman, when it denied them notice of any charges of misconduct and an opportunity to be heard. We vacate both the award of attorney's fees and costs against the United States and the public reprimands of Cronin and Hoffman, but we deny the request of Cronin and Hoffman that we reassign the case to a different district judge at this stage.

I. BACKGROUND

We address the background of this appeal in two parts. First, we discuss the prosecution of Shaygan and the collateral investigation of witness tampering. Second, we discuss the sanctions hearing, the award of attorney's fees and costs under the Hyde Amendment, and the public reprimands of Cronin and Hoffman.

A. The Prosecution of Shaygan and the Witness Tampering Investigation

On June 9, 2007, a patient of Dr. Ali Shaygan, James Brendan Downey, died from an overdose of various drugs including methadone and cocaine. Shaygan had prescribed methadone to Downey two days before his death. An autopsy revealed that the level of methadone in Downey's blood alone was enough to kill him.

After Downey's death, the Drug Enforcement Administration conducted an undercover investigation of Shaygan. Matthew Drake and Paul Williams, local police officers, posed as prospective patients of Shaygan to determine how easily they could obtain prescriptions of controlled substances. Drake and Williams recorded their conversations and obtained prescriptions for several controlled substances on their first visits to Shaygan. The officers presented no medical records and were given minimal physical examinations.

On February 8, 2008, the government filed an indictment that charged in 23 counts that Shaygan had distributed and dispensed controlled substances outside the scope of professional practice and not for a legitimate medical purpose in violation of federal law. 21 U.S.C. § 841(a)(1). When the indictment was filed, the government had not yet identified any of Shaygan's other patients. On February 11, 2008, Administration agents arrested Shaygan and obtained his consent to search his office. The agents seized patient files and Shaygan's day planner.

On May 14, 2008, Shaygan filed a motion to suppress statements made at the time of his arrest. In the motion, Shaygan alleged that, "[d]espite Dr. Shaygan's repeated, unequivocal requests to speak with a lawyer, the agents continued to interrogate him, ignoring his requests as if they did not exist." He also alleged that an agent "us[ed] scare tactics and repeatedly ma[de] clicking noises with his firearm[ ] ... [and] brandished his firearm in front of Dr. Shaygan, intimidating him." The government filed a response that contested the factual allegations in the motion to suppress. Instead of a clear request for an attorney, the government alleged that Shaygan asked, "[S]hould I call my attorney?" or "[D]on't I need to call my attorney?" According to the government, Shaygan was advised that he could either invoke his right to counsel and not answer any questions or he could choose to cooperate, and he stated that he wanted to cooperate and answered questions.

The government determined from Shaygan's day planner that he had met with Downey and several additional patients, including Andrew Gribben and Courtney Tucker, on the same day at a Starbucks coffee store. An Administration agent interviewed one of Shaygan's patients, Carlos Vento, on July 29, 2008. According to an Administration DEA–6 report, Vento stated that Shaygan had offered to pay him and another patient, Trinity Clendening, if they kept silent about Shaygan's role in Downey's death.

On July 31, 2008, the parties participated in a discovery conference at which the lead prosecutor confronted the lead defense attorney about the motion

to suppress. As the parties argued about which version of the facts was correct, the lead prosecutor, Sean Cronin, stated to Shaygan's lead attorney, David Markus, that pursuing the motion to suppress would result in a "seismic shift." Soon afterward, Markus had Shaygan take a polygraph test.

The Administration interviewed Clendening on August 8, 2008, and he corroborated Vento's accusations about Shaygan's offer to pay for their silence. On August 13, 2008, the Administration interviewed Gribben, who stated that he and a friend, David Falcon, had received prescriptions from Shaygan without medical examinations. Although the government was initially unable to locate Falcon, it eventually found him, and he testified at trial.

The Administration interviewed Tucker on August 15, 2008, and she identified her boyfriend, Wayne McQuarrie, as an additional patient of Shaygan. According to a DEA–6 report prepared by Administration Agent Christopher Wells about Tucker's interview, Tucker made positive statements about Shaygan, including that he "conducted a thorough examination" and "seemed very interested in her well being." The DEA–6 report also contained negative statements attributed to Tucker concerning Shaygan, including that he "seemed to become more interested in making money than addressing her medical condition or improving her overall health during the year and a half that she purchased prescriptions from him." Soon after Agent Wells interviewed Tucker, defense investigator Michael Graff spoke with Tucker on the telephone. Graff later

explained in an email to Shaygan's attorneys that Tucker thought that Agent Wells had tried to put a negative spin on her statements about Shaygan.

At a hearing on the motion to suppress on August 26, 2008, Markus recounted Cronin's "seismic shift" comment and related it to an abandonment of plea negotiations and a change in prosecutorial tactics: "[Cronin] told me that ... if we were to litigate these issues, there was going to be no more plea discussions.... [I]f I went after his witnesses, and to use his words[,] there would be [a] seismic shift in the way he would prosecute the case."

On September 17, 2008, Administration agents interviewed McQuarrie, Vento, and Clendening, and on September 26, 2008, the government filed a superseding indictment that contained 141 counts. The additional counts in the superseding indictment alleged additional charges based on the newly identified patients. The government filed the superseding indictment only nine days after Administration agents had interviewed McQuarrie for the first time.

A magistrate judge recommended that Shaygan's statements following his arrest should be suppressed because he had invoked his right to counsel. The magistrate judge discredited the testimony of Administration agents in part because Cronin had prepared the agents together for the hearing. The magistrate judge found a defense witness's testimony more credible. That witness stated that he heard Shaygan ask, "[M]ay I please have my lawyer?" The

defense witness did not testify that repeated requests were made; nor did the witness testify that agents used scare tactics to intimidate Shaygan. The district court later adopted the magistrate judge's report and recommendation.

After Tucker and McQuarrie were subpoenaed to testify as government witnesses at trial, Tucker called Agent Wells and expressed confusion about why she would be testifying for the prosecution. Tucker sought reassurance from Agent Wells that she and McQuarrie would not be portrayed as drug addicts. Immediately after the conversation, Agent Wells called Cronin and said that he was concerned that Tucker was "going south" as a witness and was showing signs of reluctance in cooperating with the government. Agent Wells did not tell Cronin that he was concerned about potential witness tampering by the defense team; Cronin later acknowledged that it was his idea during the phone call to explore the possibility of a witness tampering investigation.

Cronin and his fellow prosecutor, Andrea Hoffman, spoke with Karen Gilbert, then chief of the narcotics section of the United States Attorney's Office, and informed her about Tucker's telephone call to Agent Wells. Cronin had earlier called an attorney at the Enforcement Operations Office of the Department of Justice to determine whether the United States Attorney's Office needed the approval of the Department to record telephone calls with members of the defense team. The attorney at the Department told him that the Office did not need approval, and Cronin reported this opinion to Gilbert. Gilbert agreed that it

would be permissible to ask potential government witnesses, Vento and Clendening, to record calls with the defense team.

Gilbert instructed Cronin that she would be responsible for the collateral investigation and that Cronin and Hoffman should take no part in the investigation. Gilbert also instructed Agent Wells not to disclose information about the collateral investigation to Cronin or Hoffman, but she failed to advise the Administration that Agent Wells was involved in both the main case and the collateral investigation. Gilbert failed to comply with an internal policy of the United States Attorney's Office that the United States Attorney be notified before the commencement of an investigation of an attorney.

Cronin called Agent Wells and told him to allow Vento and Clendening to record calls with the defense team, and Cronin said that, from that day forward, he would have no involvement in the collateral investigation. Vento later recorded a conversation with defense investigator Graff and reported the contact to Agent Wells. Agent Wells called Cronin and told him that Vento had recorded a call. Agent Wells contended that he called Cronin only because he was unable to reach Gilbert.

The next day, Agent Wells and Gilbert listened to Vento's recording, and Gilbert determined that it contained no evidence of witness tampering. But Gilbert decided to continue the investigation. Soon afterward, Gilbert assigned another Assistant United States Attorney, Dustin Davis, to the collateral

investigation. Agent Wells later produced a DEA–6 report about both his earlier conversation with Tucker and Vento's recording of Graff.

Later, Agent Wells spoke with Clendening about a recording he had made of a conversation with defense attorney Markus. Clendening reported that he had been able to record only a small portion of the conversation before his recording device became disconnected. Agent Wells later stated that he did not listen to Clendening's recording or report the content of Clendening's conversation with Markus to either Cronin or Hoffman. Clendening also recorded a second conversation with Markus that later came to light in open court; Clendening had not told Agent Wells about this second recording.

The Administration later reassigned the collateral investigation from Agent Wells to Agent James Brown. Agent Brown then called Vento and Clendening to tell them that they would not be permitted to record future conversations without first executing agreements to be confidential informants. The next day, Vento signed a confidential informant agreement, but Clendening never met with Agent Brown and did not sign an agreement. Agent Brown prepared a DEA–6 report about the confidential informant agreement with Vento. Cronin and Hoffman later called Agent Brown to inform him that the trial was going to begin in eight days.

At a status conference the week before trial, the district court ordered the government to turn over any DEA–6 reports so that the court could read them before

trial to determine if they contained any exculpatory material that should be given to the defense under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Two days later, Cronin filed DEA–6 reports for several witnesses. Cronin had asked Agent Wells for all DEA–6 reports, but did not ask specifically for those generated in the collateral investigation. The government did not produce the DEA–6 report of Agent Wells's interview of Tucker that had prompted the collateral investigation or Agent Brown's DEA–6 report of Vento's confidential informant agreement.

Trial began on February 17, 2009, and the first witness for the government was Downey's girlfriend, Crystal Bartenfelder. Bartenfelder testified that she had visited Shaygan's office with Downey and that Shaygan had not conducted any kind of physical examination of Downey. She testified that, during the same visit, Downey asked Shaygan for more oxycodone than he had previously been prescribed. She testified that Shaygan expressed concern that the increased amount of oxycodone would look suspicious, so Shaygan suggested methadone, which Downey accepted. Bartenfelder was with Downey the night he died, and she testified that he died in his sleep after taking the methadone.

Three of Shaygan's former associates testified for the government. Shaygan's former business partner, Michael Marchese, testified that Shaygan provided him prescriptions for controlled substances whenever he asked, without legitimate medical reasons, and he testified that Shaygan falsified medical records.

Marchese also testified that he purchased pills directly from Shaygan and then resold the pills. Amber Herring, one of Shaygan's nurses, testified that Shaygan wrote prescriptions for her for no charge with the understanding that Herring would give Shaygan half of the pills once she filled the prescription. Wilberg Guzman, Shaygan's former office assistant, testified that Shaygan provided prescriptions in Guzman's name and had Guzman fill the prescription with money Shaygan gave him and then deliver the pills to Shaygan.

The police officers who had posed as patients, Drake and Williams, also testified. The government played tape recordings of their conversations with Shaygan for the jury. Drake and Williams explained how Shaygan had provided them prescriptions for controlled substances.

The government also presented testimony from patients the government discovered after the first indictment had been filed and whose testimony supported the charges added in the superseding indictment. Vento testified that he called Shaygan after Downey died to tell him that Downey's brother was angry that Downey had taken an overdose of medication that Shaygan had prescribed. Vento stated that he and Clendening later visited Shaygan's office in Miami and told Shaygan that the Administration had interviewed Downey's girlfriend and that the Administration knew that Shaygan had been meeting with patients at a Starbucks. Vento testified that, after he informed Shaygan that he might be investigated, he watched Shaygan add information, such as weight and

blood pressure measurements, that had been missing from Downey's medical file. The government presented evidence of several prescriptions Shaygan wrote for Vento that day, and Vento testified that Shaygan told him and Clendening that they did not need to pay for doctor visits again. Guzman also testified that Shaygan instructed him not to charge Vento for office visits because Vento was going to do landscaping work for him. Vento testified further that, when he visited Shaygan again four days later, Shaygan wrote a prescription that was intended for Vento's wife, but was actually written for Vento, even though Shaygan had not performed a medical examination on Vento's wife. Vento's wife testified and corroborated Vento's story. Clendening testified that he was not charged for his visit to Shaygan's office in exchange for not talking about what was said in the office regarding Downey's death and Shaygan's practices. The government presented a page from Shaygan's day planner to establish that Vento and Clendening had not been charged for their visit to Shaygan on the day in question. Shaygan admitted that he did not charge Vento or Clendening for their visit that day, but he contended that he did not charge them for the visit because he "felt badly" about Downey's death, not to ensure their silence.

Neither Tucker's nor McQuarrie's testimony supported the prosecution's theory, but their earlier statements and evidence from their medical files did. Tucker testified that Shaygan was attentive and thorough. Tucker denied making negative statements about Shaygan—such as he seemed to be more interested in making money than in addressing her

overall medical condition—that were attributed to her in the DEA–6 report that Agent Wells prepared after he interviewed her. McQuarrie testified that Shaygan reviewed his medical history and performed physical examinations. McQuarrie testified that Shaygan seemed more concerned with his well-being than with money, and when the government attempted to impeach McQuarrie's testimony with his earlier statements to Administration agents, he stated that he could not recall whether he had answered the question differently. The government introduced the medical files of Tucker and McQuarrie, which contained prescriptions for several months without any record of corresponding medical evaluations.

Two other patients who had been identified after Shaygan's arrest, Gribben and Falcon, testified in support of the charges in the superseding indictment. Gribben testified that he visited Shaygan because Gribben had heard that Shaygan would provide prescriptions for whatever pain pills a patient wanted. Gribben testified that he met with Shaygan at a Starbucks on a few occasions. At these appointments, which lasted only about five to ten minutes, Gribben paid Shaygan and received the prescriptions; Shaygan did not perform a physical examination. Gribben admitted that he was not going to Shaygan for pain, but because he had a drug addiction. Falcon testified that Gribben introduced him to Shaygan. Falcon's first appointment with Shaygan was at a Starbucks where he received prescriptions without a physical examination. Falcon also testified that he later visited Shaygan at his office on multiple occasions and received prescriptions even though he never had a

magnetic resonance image despite Shaygan's request that he obtain one. Falcon testified that he stopped seeing Shaygan and moved out of state because he was addicted to pain killers and "it was [too] easy for [him] to obtain medication."

The defense presented its own witnesses who testified that Shaygan treated them for non-pain management reasons, and Shaygan testified in his own defense. The defense also established its case by impeaching the credibility of the witnesses for the government.

During the cross-examination of Clendening on February 19, 2009, Shaygan's counsel, Markus, asked Clendening if he recalled a telephone conversation in which Clendening told Markus that he would have to pay him for his testimony, and Clendening responded, "No. I got it on a recording at my house." Markus did not immediately respond to this statement about a recording, nor did the government mention it on redirect.

On the next day of trial, Gilbert appeared before the court to disclose the recording of conversations by Vento and Clendening. Gilbert testified at the sanctions hearing that she first heard about the existence of the recording mentioned by Clendening when she was at a restaurant on the evening of February 19, 2009, with a group of people that included Cronin and Hoffman. After Gilbert revealed the existence of the collateral investigation, Shaygan moved for a mistrial. The district court declined to rule on Shaygan's motion for a mistrial, but instead ordered

the government to produce affidavits from anyone with knowledge of the matter. The government provided the affidavits over the next few days. Shaygan later filed a motion to dismiss the indictment.

The government argued that the fair remedy for the prosecution's failure to reveal that Vento and Clendening were confidential informants was to recall those two witnesses for further cross-examination. The government proposed that the jury should be given "a limited instruction ... explaining that the recall is not through any fault of the defendant, but pointing out that certain materials were turned over late by the Government to[ ] ... allay[ ] Mr. Markus' concern that the jury will blame the defense." Shaygan initially argued that, if the court declined to dismiss the indictment or grant a mistrial, the only fair remedy was to strike the testimony of Vento and Clendening and "explain to the jury about the misconduct and about the misrepresentations to them about these witnesses."

The district court ruled that it was not going to strike the witnesses' testimony and wanted to know if Shaygan wanted to recall the two witnesses. The district court added that, even if the witnesses were recalled, "it's not the end of the story.... I would have to go through the evidentiary hearing and determine what else I want to do at the end of the day here." Shaygan took the position that, absent dismissal, mistrial, or striking the testimony, recall of Vento and Clendening would be required.

When Vento and Clendening were recalled, the

district court instructed the jury that the recalling of the witnesses was attributable to prosecutorial misconduct in discovery:

> I am now going to reopen the defense cross-examination of two prior witnesses. These are witnesses you have heard from, Carlos Vento and Trinity Clendening. And the reason is that the United States has failed to provide timely to the defense certain information and discovery materials which could have been used by the defense during its cross-examination of each of these witnesses.
>
> This occurred through no fault of the defense. Now, during the cross-examination that you are going to hear, I expect that you will hear reference to the substance of recorded conversations of defense counsel or members of the defense team by these two witnesses.
>
> I have personally reviewed the substance of the recorded conversations, and I can assure you that the defense did nothing wrong. Because I concluded that the United States has acted improperly in not turning over the necessary discovery materials and also by allowing recordings to occur in the first place, I am reopening the witnesses' examination so you can hear everything that occurred. Other than that, I [have] no further comment on the evidence.

Shaygan took advantage of the opportunity to focus the attention of the jury on the alleged misconduct by the government in the collateral investigation. During the new cross-examinations of Vento and Clendening,

Shaygan accused them of not telling the whole truth to the jury because they had not revealed that they had been asked to record conversations with the defense team. In closing argument, Shaygan compared the alleged misconduct by the government to the Salem witch trials. Shaygan reminded the jury that the district court had instructed them that the "United States [had] acted improperly," and argued that the jurors had been misled by the government. Shaygan argued that innocent women had been convicted and hung in the Salem witch trials "because there were no jurors," and Shaygan urged the jury to say "no" and to "make sure the Salem, Massachusetts[,] witch trials never happen again."

The jury returned a verdict of not guilty on all counts. Immediately after the jury was dismissed, the district court ordered the government to appear on the following Monday "to address the motions that have been filed." The court stated that it would "hear alternative requests for sanctions," including whether a sanction in the form of attorney's fees and costs should be awarded under the Hyde Amendment.

B. The Sanctions Proceeding

One day before the inquiry on sanctions, Shaygan moved for an award of attorney's fees and costs under the Hyde Amendment. The district court required the presence of seven witnesses: Tucker, Agent Wells, Agent Brown, Gilbert, Cronin, Hoffman, and defense investigator Graff. All of the witnesses testified except Hoffman. The district court allowed witnesses in the court room only during their own testimony. At the end

of the proceeding, the court stated that it had "heard sufficiently" and did not need to hear from Hoffman.

During the proceeding, the government admitted that mistakes had been made in the witness-tampering investigation and in the failure to provide discovery materials to the defense, but the government denied that its legal position had been vexatious or in bad faith. Shaygan conceded that the initiation of the prosecution and the original indictment were not in bad faith, but argued that the prosecution later "became frivolous and in bad faith." Shaygan pointed to the filing of the "superseding Indictment with a hundred extra counts," the investigation of members of the defense team, and discovery violations. Shaygan conceded that "[a]t the end of the day going after the defense lawyers may not be enough under the Hyde Amendment," but then argued that the prosecution was vexatious, frivolous, and in bad faith because of discovery violations. Shaygan argued that, under the Hyde Amendment, "[d]iscovery [abuse alone is enough] ... to find bad faith and find a prosecution being frivolous."

The government opposed Shaygan's contention that the superseding indictment was used as "an instrument of vengeance" and argued that "the record ... shows that there were legitimate, evidence-based, reviewed, approved, and well-founded strategic reasons to supersede the Indictment to add all those additional patients to secure the admission of what the Government believed to be relevant evidence and to help strengthen the case." The government argued that the superseding indictment had been filed in good

faith:

> There's no improper purpose whatsoever to continuing an investigation when new evidence has been obtained and when time is available to review that and move forward on that and determine if a case should be expanded on, and that was a completely legitimate, evidence-based purpose to go ahead with the superseding Indictment.

Cronin testified that he had decided to supersede the indictment because the government had been "able to find so many additional witnesses."

At the end of the proceeding, Shaygan stated that he was not requesting that the court "exercise any inherent powers of contempt as relating to anyone in the United States Attorney's Office," but would "defer to the Court on that." After hearing all testimony of witnesses, except Hoffman, and oral argument on whether a sanction under the Hyde Amendment was appropriate, the court allowed additional papers to be filed. The court at no time stated that it was considering sanctions against the individual prosecutors.

The government filed a brief after the proceeding in which it "acknowledge[d] and deeply regret[ted] that it made serious mistakes in a collateral investigation that was an offshoot of this case." The government agreed to pay "reasonable attorneys' fees and costs associated with Shaygan's motion to dismiss and for sanctions and the related proceedings." But the government argued that "payment of the fees and costs

associated with the entire prosecution is not warranted under the Hyde Amendment because the underlying criminal prosecution, as a whole, was not vexatious, frivolous, or pursued in bad faith." The government nonetheless "believe[d] that the United States should take responsibility for commencing the witness tampering investigation ... and failing to make the required disclosures," and agreed to pay Shaygan's attorney's fees and costs associated with litigating the motions to dismiss and for sanctions.

The district court granted Shaygan's motion under the Hyde Amendment and ordered the United States to reimburse Shaygan in the amount of $601,795.88 for attorney's fees and costs from the date of the superseding indictment. The district court issued a lengthy written order in which it recounted facts about the prosecution and witness tampering investigation, but virtually ignored the substantial evidence that supported the charges against Shaygan. The district court agreed with the government that the original indictment had been filed in good faith, but concluded that "AUSA Cronin, with the assistance of AUSA Hoffman, along with DEA Special Agent Christopher Wells, acted vexatiously and in bad faith in prosecuting Dr. Shaygan for events occurring after the original indictment was filed and by knowingly and willfully disobeying the orders of this Court." The district court found that the superseding indictment was filed in bad faith because it was "the first manifestation of the 'seismic shift' " and because "[t]he patients that were included in the Superseding Indictment were known to the Government long before the motion to suppress was litigated, yet no

Superseding Indictment was sought at an earlier time." The district court found further incidents of bad faith in the witness tampering investigation and discovery violations.

The district court reasoned that the Hyde Amendment allows an award of fees and costs for misconduct that occurred after the filing in good faith of the original indictment. The district court quoted the high standard for an award of attorney's fees and costs under the Hyde Amendment, as explained by this Court in Gilbert: "A defendant must show that the government's position underlying the prosecution amounts to prosecutorial misconduct—a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous." 198 F.3d at 1299. The district court then relied on the decision of the Supreme Court in Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973), for the proposition that "[t]he Hyde Amendment is applicable to conduct by the government during the course of a prosecution taken in bad faith even if the commencement of the prosecution was commenced legitimately." The district court also relied on the decisions of the district courts in United States v. Ranger Electronic Communications, Inc., 22 F.Supp.2d 667 (W.D.Mich.1998), rev'd on other grounds, 210 F.3d 627 (6th Cir.2000), and United States v. Troisi, 13 F.Supp.2d 595 (N.D.W.Va.1998), and reasoned that "discovery violations in the course of a prosecution can form a basis for the award of attorney's fees under the Hyde Amendment."

The district court entered additional sanctions against the prosecutors. The district court entered a

public reprimand "against the United States Attorney's Office and specifically against AUSA Karen Gilbert, Sean Cronin, and Andrea Hoffman." The district court ordered the United States Attorney's Office to provide "the contact information for the relevant disciplinary body of the Bar(s) of which AUSA Cronin and Hoffman are members," and stated that it would request that disciplinary action be taken against Cronin and Hoffman. The district court enjoined the United States Attorney's Office from "engaging in future witness tampering investigation[s] of defense lawyers and team members in any ongoing prosecution before [the court] without first bringing such matters to [its] attention in an ex parte proceeding." The court further stated that it "reserve[d] to impose any further sanctions and/or disciplinary measures as may be necessary against AUSA Cronin and Hoffman after reviewing the results of [a] Justice Department[ ] investigation."

II. STANDARD OF REVIEW

Two standards of review govern this appeal. First, we review an award of attorney's fees and costs under the Hyde Amendment for abuse of discretion. United States v. Aisenberg, 358 F.3d 1327, 1338 (11th Cir.2004). "An abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award [or a denial] upon findings of fact that are clearly erroneous." Gilbert, 198 F.3d at 1298 (alteration in original) (quoting In re Hillsborough Holdings Corp., 127 F.3d 1398, 1401 (11th Cir.1997) (citation and internal quotation marks omitted)). Second, "[w]e review de novo the argument that the

sanctions imposed by the district court violated due process." Serra Chevrolet, Inc. v. Gen. Motors Corp., 446 F.3d 1137, 1147 (11th Cir.2006).

III. DISCUSSION

We discuss the merits of this appeal in two parts. First, we explain how the district court abused its discretion when it awarded attorney's fees and costs against the United States under the Hyde Amendment. Second, we explain how the district court violated the rights of Cronin and Hoffman to due process, but why we decline to reassign this case to a different district judge at this stage.

A. The District Court Applied an Incorrect Legal Standard When It Awarded Attorney's Fees and Costs against the United States under the Hyde Amendment.

The government makes two arguments that the district court abused its discretion when it awarded attorney's fees and costs against the United States under the Hyde Amendment. First, the government argues that the district court clearly erred when it found that the superseding indictment was "significantly motivated by ill-will." Second, the government argues that the district court committed a legal error because the litigating position of the United States was not "vexatious[ ], in bad faith, or so utterly without foundation in law or fact as to be frivolous." Gilbert, 198 F.3d at 1299.

We need not decide whether the finding that the filing of the superseding indictment was motivated by subjective ill-will is clearly erroneous. The district court found the superseding indictment was motivated by Cronin's ill-will because "[t]he patients [who] were included in the Superseding Indictment were known to the Government long before the motion to suppress was litigated, yet no Superseding Indictment was sought at an earlier time." The government contends that some of the patients who were included in the superseding indictment were not known to the government until after the motion to suppress had been filed and soon before the hearing on that motion. The government also argues that the finding that the filing of the superseding indictment was motivated by ill-will is clearly erroneous because Cronin's superiors in the United States Attorney's Office reviewed and approved the superseding indictment before it was presented to the grand jury; the final decision rested with others. We need not decide these issues because, even if we assume that the filing of the superseding indictment was subjectively motivated by ill-will, that finding alone cannot support a sanction against the United States under the Hyde Amendment.

We agree with the government that the district court failed to understand the narrow scope of the Hyde Amendment. Congress enacted the Hyde Amendment as part of the Appropriations Act of 1998, and it provides a high standard for an award of attorney's fees and costs against the United States in a criminal case:

> [T]he court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) ... may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [the Equal Access to Justice Act].

Pub.L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes). The initial proposed version of the Hyde Amendment would have allowed a prevailing defendant to recover attorney's fees and costs unless the government could establish that its position was "substantially justified"—modeled after the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A)—but that version was criticized on the ground that it made recovery for a prevailing defendant too easy. See Gilbert, 198 F.3d at 1299–1303 (explaining the legislative history of the Hyde Amendment).

"[I]n response to concern that the initial version of the Hyde Amendment swept too broadly, the scope of the provision was curtailed significantly" by Congress in two ways. Id. at 1302. First, instead of the "substantially justified" standard from the Equal Access to Justice Act, the Hyde Amendment imposed a standard more favorable to the government: a prosecution must be "vexatious, frivolous, or in bad

faith." Second, unlike the Equal Access to Justice Act, the Hyde Amendment placed the burden of satisfying that standard on the defendant, not on the government.

We explained in Gilbert the "daunting obstacle," id. at 1302, a defendant must overcome—at a minimum, satisfying an objective standard that the legal position of the United States amounts to prosecutorial misconduct—for an award of attorney's fees and costs under the Hyde Amendment:

> From the plain meaning of the language Congress used, it is obvious that a lot more is required under the Hyde Amendment than a showing that the defendant prevailed at the pre-trial, trial, or appellate stages of the prosecution. A defendant must show that the government's position underlying the prosecution amounts to prosecutorial misconduct—a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous.

Id. at 1299. Gilbert established that our inquiry under the Hyde Amendment is whether the prosecution of Shaygan for illegally dispensing controlled substances amounted to misconduct.

Because the words "vexatious, frivolous, or in bad faith," are not defined in the Hyde Amendment, we defined them in Gilbert according to their ordinary meaning. Id. at 1298–99. " 'Vexatious' means 'without reasonable or probable cause or excuse.' " Id. (quoting Black's Law Dictionary 1559 (7th ed. 1999)). "A

'frivolous action' is one that is '[g]roundless ... with little prospect of success; often brought to embarrass or annoy the defendant.' " Id. at 1299 (alterations in original) (quoting Black's Law Dictionary 668 (6th ed. 1990)). " '[B]ad faith' 'is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will.' " Id. (second alteration in original) (quoting Black's Law Dictionary 139 (6th ed. 1990)).

The district court erroneously concluded that the superseding indictment was filed in bad faith under the Hyde Amendment. The district court found that it was "Cronin's displeasure and ill-will toward defense counsel as a result of Defendant's Motion to Suppress, as evidenced by his 'seismic shift' comment [ ] [that] led to the filing of a Superseding Indictment," but the record establishes that, regardless of Cronin's displeasure or subjective ill-will, the government had an objectively reasonable basis for superseding the indictment.

We do not measure bad faith or vexatiousness only by whether a prosecutor expressed displeasure with defense counsel. "Bad faith is an objective standard that is satisfied when an attorney knowingly or recklessly pursues a frivolous claim." Peer v. Lewis, 606 F.3d 1306, 1314 (11th Cir.2010); see also United States v. Knott, 256 F.3d 20, 29 (1st Cir.2001) ("[A] determination that a prosecution was 'vexatious' for the purposes of the Hyde Amendment requires ... a showing that the criminal case was objectively

deficient, in that it lacked either legal merit or factual foundation[]...."); United States v. Sherburne, 249 F.3d 1121, 1126–27 (9th Cir.2001) ("We conclude that for purposes of the Hyde Amendment, the term 'vexatious' includes both of these characteristics: subjective and objective.") (footnote omitted). "[A] prosecutor's discretion is [also] 'subject to constitutional constraints.' " United States v. Armstrong, 517 U.S. 456, 464, 116 S.Ct. 1480, 1486, 134 L.Ed.2d 687 (1996) (quoting United States v. Batchelder, 442 U.S. 114, 125, 99 S.Ct. 2198, 2204–05, 60 L.Ed.2d 755 (1979)). "[T]he decision whether to prosecute may 1313 not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.' " Id. (quoting Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962)). But a finding of bad faith under the Hyde Amendment cannot rest on evidence of displeasure or subjective ill-will alone.

In the light of the evidence that supported the superseding indictment, the charges against Shaygan were not objectively filed in bad faith; the government did not "knowingly or recklessly pursue a frivolous claim," Peer, 606 F.3d at 1314, or exceed any constitutional constraint, see Armstrong, 517 U.S. at 464, 116 S.Ct. at 1486. The government interviewed additional patients of Shaygan after his arrest, and those patients gave incriminating information about Shaygan, including that he had dispensed controlled substances without performing physical examinations. The government also used evidence from Shaygan's medical files and day planner to build its case. All of the patients who were added by the superseding indictment testified as witnesses for the government at

trial. Even if the testimony of Tucker and McQuarrie contradicted the DEA–6 reports prepared after their initial interviews, "[f]or Hyde Amendment purposes[ ] ... the court must assess the basis for pursuing charges from the perspective of the government at the time." Knott, 256 F.3d at 35.

We define bad faith for purposes of the Hyde Amendment as " 'the conscious doing of a wrong,' " Gilbert, 198 F.3d at 1299 (quoting Black's Law Dictionary 139 (6th ed. 1999)), and superseding an indictment with the support of newly discovered evidence does not meet that standard. Newly obtained evidence is unquestionably a good faith reason to supersede an indictment. See United States v. Bryant, 770 F.2d 1283, 1287 (5th Cir.1985) ("[N]ewly discovered evidence[ ] [that] indicat[ed] that the extent of [a defendant's] misconduct was much greater than had been known at the time the original indictment was filed[ ] justifiably motivated the prosecutorial decision to obtain additional counts."). The filing of a superseding indictment supported by newly discovered evidence is not prosecutorial misconduct.

A comparison with the Equal Access to Justice Act confirms that Congress created an objective standard of bad faith to govern an award of attorney's fees and costs under the Hyde Amendment. Under the Equal Access to Justice Act, which provides for an award of attorney's fees and costs against the United States for a prevailing party in a civil action, the government can avoid an award by establishing that its legal position was "substantially justified." 28 U.S.C. § 2412(d)(1)(A). If a finding of subjective ill-will alone were sufficient to

sustain an award of fees under the Hyde Amendment, then it would be more difficult to obtain an award of fees under the Equal Access to Justice Act than under the Hyde Amendment: a prosecution might be "substantially justified" within the meaning of the Equal Access to Justice Act because it is supported by substantial evidence, but punishable by sanctions under the Hyde Amendment if the prosecutor harbored ill-will. Congress intended the opposite: that is, to make an award of attorney's fees and costs under the Hyde Amendment more, not less, difficult to obtain than under the Equal Access to Justice Act. See Gilbert, 198 F.3d at 1302. In other words, if Shaygan "failed even to establish that the government's prosecution ... was not substantially justified, [he] cannot establish that the prosecution was vexatious, frivolous, or in bad faith." United States v. Truesdale, 211 F.3d 898, 910 (5th Cir.2000).

Bad faith is also measured objectively in other instances of litigation misconduct that, unlike the Hyde Amendment, do not implicate sovereign immunity. A federal court, for example, can sanction a private attorney for "unreasonably and vexatiously" multiplying a proceeding, 28 U.S.C. § 1927, "only when the attorney's conduct is so egregious that it is 'tantamount to bad faith,' " Amlong & Amlong, P.A. v. Denny's, Inc., 500 F.3d 1230, 1239 (11th Cir.2007) (quoting Avirgan v. Hull, 932 F.2d 1572, 1582 (11th Cir.1991)), and "bad faith turns not on the attorney's subjective intent, but on the attorney's objective conduct," id.; see also Norelus v. Denny's, Inc., 628 F.3d 1270, 1282 (11th Cir.2010) ("The standard is an objective one...."). In a recent decision, where we

reviewed the denial of sanctions under Federal Rule of Civil Procedure 11, section 1927, and the inherent power of a district court, we reaffirmed that "[b]ad faith is an objective standard that is satisfied when an attorney knowingly or recklessly pursues a frivolous claim." Peer, 606 F.3d at 1314. If a determination of bad faith is governed by an objective standard when sanctions are imposed on private attorneys and litigants, bad faith cannot be established by a lesser showing when sanctions are imposed against the United States. After all, "the established principle that waivers of sovereign immunity are to be construed narrowly counsels our construction of the Hyde Amendment." Aisenberg, 358 F.3d at 1341.

Respect for the separation of powers also informs our understanding that the Hyde Amendment provides an objective standard for bad faith. "In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 1530, 84 L.Ed.2d 547 (1985) (quoting United States v. Goodwin, 457 U.S. 368, 380 n. 11, 102 S.Ct. 2485, 2492 n. 11, 73 L.Ed.2d 74 (1982)). The Attorney General and United States Attorneys "have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.' " Armstrong, 517 U.S. at 464, 116 S.Ct. at 1486 (quoting U.S. Const. art. II, § 3). "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." Wayte, 470 U.S. at 607, 105 S.Ct. at 1530. "It also stems from a concern not to unnecessarily impair the performance of

a core executive constitutional function." Armstrong, 517 U.S. at 465, 116 S.Ct. at 1486. In the light of this constitutional framework, we cannot read the Hyde Amendment to license judicial second-guessing of prosecutions that are objectively reasonable.

Our review of the good or bad faith of a prosecution under the Hyde Amendment is akin to our review of qualified immunity, which shields official acts that are objectively reasonable. "Qualified immunity is a real-world doctrine designed to allow [public] officials to act (without always erring on the side of caution) when action is required to discharge the duties of public office." Foy v. Holston, 94 F.3d 1528, 1534 (11th Cir.1996). In that context, "[o]bjective legal reasonableness is the touchstone." Lassiter v. Ala. A & M Univ., Bd. of Trs., 28 F.3d 1146, 1150 (11th Cir.1994) (en banc); see also Hope v. Pelzer, 536 U.S. 730, 747, 122 S.Ct. 2508, 2519, 153 L.Ed.2d 666 (2002) ("applying the objective immunity test of what a reasonable officer would understand"). For that reason, we will grant qualified immunity from civil liability for an official whose conduct is objectively reasonable "even when motivated by a dislike or hostility to certain protected behavior by a citizen." Foy, 94 F.3d at 1534. And we do so for a sound reason: "When public officials do their jobs, it is a good thing." Id. In the same 1315 way, we cannot interpret the Hyde Amendment to thwart the objectively reasonable performance of prosecutorial duties.

Shaygan did not even argue that the charges in the superseding indictment were frivolous or exceeded any constitutional constraint. Shaygan relied instead

primarily on Cronin's "seismic shift" comment to establish that the superseding indictment was filed in subjective bad faith, but tough negotiating tactics and harsh words used by prosecutors cannot alone be grounds for a determination of bad faith under the Hyde Amendment.

A rule that would allow a determination of bad faith whenever a prosecutor uses harsh words, such as "seismic shift," and harbors some ill-will toward the defense would "chill the ardor of prosecutors and prevent them from prosecuting with earnestness and vigor. The Hyde Amendment was not intended to do that." Gilbert, 198 F.3d at 1303. In United States v. Schneider, for example, the Second Circuit held that an "alleged vow to indict [a defendant] if he invoked the Fifth Amendment ... without more," could not support an award of attorney's fees under the Hyde Amendment. 395 F.3d 78, 88 (2d Cir.2005). The same result is required here, where the prosecution filed a superseding indictment supported by newly-discovered evidence, even if that filing was prompted by Shaygan's allegations in support of his motion to suppress. The Supreme Court has explained that, in all but an exceptional case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978).

This appeal is unlike United States v. Adkinson, 247 F.3d 1289 (11th Cir.2001), where we affirmed an

award under the Hyde Amendment because the litigating position of the government was vexatious, frivolous, and in bad faith, id. at 1293. In Adkinson, the government, " '[w]ith full knowledge that it was contrary to recent and controlling precedent, ... induced the grand jury' to charge" the defendant with a crime that did not exist. Id. at 1292 (alterations in original) (quoting United States v. Adkinson, 135 F.3d 1363, 1374 (11th Cir.1998)). We held that "[p]rosecuting [defendants] in defiance of controlling authority constitutes 'vexatious,' 'frivolous,' and 'bad faith' prosecutions." Id. at 1293. In this appeal, no one contends that Shaygan was charged with conduct that did not constitute a crime. Dispensing controlled substances outside the scope of professional practice is a crime, 21 U.S.C. § 841(a)(1), and Shaygan would have been legitimately convicted if the jury had believed the witnesses for the government. See Schneider, 395 F.3d at 85 ("The case was not vexatious because the government had more than adequate evidence to establish each element of the crimes and the jury's credibility determinations did not undermine the legal merit or factual foundation of the prosecution.").

The district court also erroneously concluded that discovery violations alone can support an award of attorney's fees and costs under the Hyde Amendment. The Hyde Amendment allows an award of attorney's fees and costs against the United States only when its overall litigating position was vexatious, frivolous, or in bad faith. The district court erroneously relied on the decision of the Supreme Court in Hall, 412 U.S. 1, 93 S.Ct. 1943, to conclude that "[t]he Hyde Amendment

is applicable to conduct by the government during the course of a prosecution taken in bad faith even if the commencement of the prosecution was commenced legitimately." The Supreme Court in Hall did not address the Hyde Amendment, but observed the general principle "that 'bad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." Id. at 15, 93 S.Ct. at 1951. Hall involved fee-shifting between two private litigants under the inherent equitable power of the court. The Hyde Amendment establishes a more stringent standard and applies only to "a prosecution brought vexatiously, [frivolously, or] in bad faith." Gilbert, 198 F.3d at 1299; see also Schneider, 395 F.3d at 90 (quoting Pub.L. No. 105–119, § 617, 111 Stat. 2440, 2519) ("We note that the statute does not allow an award for any instance of vexatious, frivolous, or bad-faith conduct. An award is allowed only where the court finds that 'the position of the United States was vexatious, frivolous, or in bad faith.' "). Moreover, Hall did not involve a waiver of sovereign immunity, but "the established principle that waivers of sovereign immunity are to be construed narrowly counsels our construction of the Hyde Amendment." Aisenberg, 358 F.3d at 1341.

The district court also erroneously relied on Troisi, 13 F.Supp.2d 595, and Ranger, 22 F.Supp.2d 667, for the proposition that "courts have held that discovery violations in the course of a prosecution can form a basis for the award of attorney's fees under the Hyde Amendment." Troisi is inapposite; the district court denied the defendant's motion under the Hyde Amendment because "the position of the United States

in prosecuting Troisi was reasonable and did not rise to the level of vexatious, frivolous, or bad faith litigation." Troisi, 13 F.Supp.2d at 597. Although the district court in Ranger awarded sanctions under the Hyde Amendment based only on discovery violations, that decision is unpersuasive. The district court in Ranger failed to discuss the meaning of "position of the United States" for purposes of the Hyde Amendment, and the Sixth Circuit later reversed its decision on alternative grounds, see United States v. Ranger Elec. Commc'ns, Inc., 210 F.3d 627 (6th Cir.2000). Contrary to Ranger, the Sixth Circuit later interpreted the term "position" in the Hyde Amendment to address a broader issue. In United States v. Heavrin, 330 F.3d 723, 725 (6th Cir.2003), the district court had awarded a defendant attorney's fees and costs under the Hyde Amendment on the ground that some of the charges against him were frivolous, but the Sixth Circuit reversed. The Sixth Circuit ruled that the district court erred when it awarded attorney's fees and costs without "assess[ing] the case as an inclusive whole." Id. at 731. The Sixth Circuit reasoned that "[a] count-by-count analysis" was inconsistent with the Hyde Amendment because its plain language refers to the "position" of the United States in the singular. Id. at 730. It concluded that, "[w]hen assessing whether the position of the United States was vexatious, frivolous, or in bad faith, the district court should ... make only one finding, which should be based on the case as an inclusive whole." Id. (internal quotation marks omitted).

We reject the dissent's reading of the text of the Hyde Amendment. The dissent argues that we have

"take[n] the word 'or' out of the statute by reading 'in bad faith' as meaning the same thing as either 'vexatious' or 'frivolous,' " Dissenting Op. at 1320, but the dissent misreads our holding. Subjective ill-will is relevant, but not sufficient for a finding of bad faith. We have explained that a prosecution brought in bad faith is one where wrongful motives are joined to a prosecution that is either baseless or exceeds constitutional restraints; a bad faith prosecution is not necessarily vexatious or frivolous. The dissent also contends that "[t]he word 'position,' as used in the Hyde Amendment, can easily apply to the way in which the Government conducts the prosecution, including the ill-will state of mind that a prosecutor's acts evidence," Dissenting Op. at 1323, n. 8, but the "position" must be that "of the United States." We read that phrase—"position of the United States"—to refer to the legal position of the government, not the mental attitude of its prosecutor.

The dissent ignores our precedents that establish that bad faith is measured objectively and instead would create a double standard. The dissent does not deny that the prosecution of Shaygan was objectively reasonable, but instead argues that district courts have discretion to award attorney's fees against the United States under the Hyde Amendment if a prosecutor is "driven along by things like personal ambition, personal vindictiveness, or politics," Dissenting Op. at 1320. The dissent fails to explain why an award of attorney's fees against the government, which implicates both the separation of powers and sovereign immunity, can be based on only subjective ill-will, but an award of attorney's fees against a private litigant

must satisfy a more demanding objective standard, see 28 U.S.C. § 1927. See also Amlong, 500 F.3d at 1239; Norelus, 628 F.3d at 1282; Peer, 606 F.3d at 1314. This double standard also would create, contrary to the intent of Congress, a more lenient standard for an award of fees under the Hyde Amendment than the standard created by the Equal Access to Justice Act, see 28 U.S.C. § 2412(d)(1)(A). See also Truesdale, 211 F.3d at 910.

The dissent asserts that "the only serious inquiry in this case is when the liability for fees and expenses should start," Dissenting Op. at 1323, because the government earlier offered to pay some fees, but the government never waived its argument that the Hyde Amendment does not support an award of attorney's fees and costs for Shaygan. The government argues on appeal that the Hyde Amendment does not apply, and Shaygan does not even suggest that the government ever waived that argument. Although the government offered to pay some of Shaygan's attorney's fees related to the collateral investigation, Shaygan never accepted the offer, which came before the district court entered its judgment. The earlier offer by the government to pay some of Shaygan's fees voluntarily is entirely different from an order of the district court requiring that those fees and more be paid by the government under the Hyde Amendment.

The district court had no discretion to award Shaygan attorney's fees and costs. When it considers a motion under the Hyde Amendment, a district court has every right to consider evidence of subjective ill-will, but that evidence is not dispositive. See

Amlong, 500 F.3d at 1241 ("Although the attorney's objective conduct is the focus of the analysis, the attorney's subjective state of mind is frequently an important piece of the calculus...."). The starting point for a potential award of attorney's fees and costs under the Hyde Amendment is an objectively wrongful prosecution: that is, a prosecution that either is baseless or exceeds constitutional constraints. If the prosecution is objectively reasonable, as was the case here, then a district court has no discretion to award a prevailing defendant attorney's fees and costs under the Hyde Amendment.

B. The District Court Deprived Cronin and Hoffman of Their Right to Due Process, but We Decline to Reassign this Case at this Stage.

The district court violated the civil rights of the two lead prosecutors, Cronin and Hoffman, when it publically reprimanded them without first affording them due process. We have been clear that "for the imposition of sanctions to be proper, a court 'must comply with the mandates of due process.' " Thomas v. Tenneco Packaging, Co., 293 F.3d 1306, 1320 (11th Cir.2002) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 50, 111 S.Ct. 2123, 2136, 115 L.Ed.2d 27 (1991)). "Due process requires that the attorney (or party) be given fair notice that his conduct may warrant sanctions and the reasons why." In re Mroz, 65 F.3d 1567, 1575 (11th Cir.1995). "Notice can come from the party seeking sanctions, from the court, or from both. In addition, the accused must be given an opportunity to respond, orally or in writing, to the invocation of such sanctions and to justify his actions." Id. at

1575–76 (citation omitted).

The district court did not provide Cronin or Hoffman with notice that it was considering a public reprimand. At the sanctions proceeding, the court specifically asked Shaygan, "You're not requesting that I exercise any inherent powers of contempt as relating to anyone in the United States Attorney's Office [?]" Shaygan responded, "No, Your Honor. I would defer to the Court on that. I don't think I have a dog in that fight.... Any other relief, I think, is better addressed between Your Honor and the U.S. Attorney's Office." Cronin and Hoffman were not even aware of this exchange because the court had sua sponte sequestered them as witnesses.

The district court conducted an inquiry, not an adversarial hearing, and both prosecutors were denied a meaningful opportunity to be heard in that proceeding. Cronin testified at the sanctions proceeding, but he was not represented by an attorney, had no opportunity to cross-examine any witnesses, and did not know that the district court might rely on his testimony to impose an individual sanction. Cronin's testimony at the sanctions proceeding did not constitute an opportunity to be heard in the Anglo–American tradition. As the Supreme Court explained long ago, "The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh." In re Ruffalo, 390 U.S. 544, 550, 88 S.Ct. 1222, 1226, 20 L.Ed.2d 117 (1968); see also

Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193, 1211 (11th Cir.1985). The denial of Hoffman's right to due process was even more egregious. Hoffman was never even called as a witness, and because of the sequestration order there was no way for Hoffman to know about the testimony of the other witnesses at the proceeding.

Cronin and Hoffman also request that we reassign this case to a different district judge, but we decline to do so. "Reassignment is an extraordinary order, and we 'do not order [it] lightly.' " United States v. Gupta, 572 F.3d 878, 891 (11th Cir.2009) (alteration in original) (quoting United States v. Torkington, 874 F.2d 1441, 1447 (11th Cir.1989)). Absent evidence of actual bias, we consider three elements: "(1) whether the original judge would have difficulty putting his previous views and findings aside; (2) whether reassignment is appropriate to preserve the appearance of justice; (3) whether reassignment would entail waste and duplication out of proportion to gains realized from reassignment." Torkington, 874 F.2d at 1447. We expect the district judge to put his previous views and findings aside, although that expectation might be unreasonable in a second, see United States v. Martin, 455 F.3d 1227, 1242 (11th Cir.2006), or third, see Gupta, 572 F.3d at 880, appeal. At this stage, reassignment is unnecessary to preserve the appearance of justice and would require undue duplication of effort.

We express no view about whether the district court should conduct further proceedings, but if the district court decides again to consider sanctions against

Cronin or Hoffman, it must, of course, afford them due process. An attorney charged with misconduct is entitled to notice of the charge: that is, the attorney is entitled to know the precise rule, standard, or law that he or she is alleged to have violated and how he or she allegedly violated it. Each of these attorneys also cannot be held responsible for the acts or omissions of others: Cronin, for example, cannot be held responsible for the acts or omissions of his superiors, such as Gilbert, and Hoffman cannot be held responsible for Cronin's acts or omissions. Another reprimand also would be subject to another appeal to this Court.

We do not mean to suggest or even hint that the district court should consider sanctions against either Cronin or Hoffman. It is not apparent to us that either attorney necessarily violated any ethical rule or any constitutional or statutory standard. The record before us is unreliable because it was developed, after all, without affording either of them due process.

IV. CONCLUSION

The award of attorney's fees and costs against the United States is VACATED. The public reprimands of Cronin and Hoffman are VACATED, and this matter is REMANDED.

EDMONDSON, Circuit Judge, dissenting in part and concurring in the result in part:

This appeal presents a question of statutory construction: what is the significance of the words "or in bad faith" in the Hyde Amendment? I dissent and

write separately because I believe that the phrase "or in bad faith" covers, and was intended to cover, prosecutorial positions beyond those positions that are baseless or exceed constitutional constraints: the limit that today's Court imposes. I would affirm the District Court's decision to award, per the Hyde Amendment, fees and expenses.

The Hyde Amendment provides that a court presiding over a criminal case "may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust." [FN1] Pub.L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes) (emphasis added). And we have said that a position taken in bad faith reflects "not simply bad judgment or negligence, but rather it ... contemplates a state of mind affirmatively operating with furtive design or ill will." United States v. Gilbert, 198 F.3d 1293, 1299 (11th Cir.1999) (internal quotation mark omitted) (quoting BLACK'S LAW DICTIONARY 139 (6th ed. 1990)).

> FN1. The Hyde Amendment words that set out the standard for the award of fees and expenses differ significantly from the words for the standard set out in the Equal Access to Justice Act ("EAJA"), which allows for awarding fees from the Government to prevailing parties in civil actions. 28 U.S.C. § 2412(d)(1)(A). And although the Hyde Amendment does incorporate

> some procedures from the EAJA, the Hyde Amendment—for the award standard—does not reference or incorporate the EAJA standard for an award. I believe that, given that the EAJA was referenced for some purposes but not for the award standard, the Hyde Amendment standard for an award was intended to be understood independently from the EAJA standard and to be understood on the Hyde Amendment's own terms. Because the loss of a person's freedom is involved, the Executive Branch's powers as prosecutor are greater, more uniquely governmental, and more to be feared by the People than the Executive Branch's power as a civil litigant; thus, it makes sense to me that Congress chose one standard for civil cases and another standard for criminal cases—and that the standard for criminal cases would stress deterring venomous prosecutorial conduct.

I understand this "state of mind" element to mean that the "in bad faith" standard is essentially a question of fact [FN2] about the federal prosecutor's subjective intent as he drove a prosecution forward. From the statute's text itself, I also understand the word "or" in the phrase "or in bad faith" to mean that "in bad faith" is a complete alternative basis to support an award of attorney's fees and other litigation expenses. So, it is unimportant that a prosecution was not "vexatious" [FN3] and was not "frivolous" [FN4]: put differently, it is not decisive under the statute that a criminal prosecution was conducted in an objectively reasonable way (not vexatious) and that the prosecution had an objectively realistic likelihood of

success (not frivolous). Congress, by adding the phrase "or in bad faith," was looking beyond litigation positions that were either vexatious or frivolous and addressing something different. We must not take the word "or" out of the statute by reading "in bad faith" as meaning the same thing as either "vexatious" or "frivolous."

> FN2. We have stated in various contexts that intent is ordinarily a question of fact. See, e.g., Rutherford v. Crosby, 385 F.3d 1300, 1307 (11th Cir.2004) (in double-jeopardy case, "[t]he prosecutor's intent is a question of fact") (citation omitted); Chanel, Inc. v. Italian Activewear of Fla., Inc., 931 F.2d 1472, 1476 (11th Cir.1991) (stating, in trademark-infringement case, that "[a]s a general rule, a party's state of mind (such as knowledge or intent) is a question of fact for the factfinder, to be determined after trial") (citations omitted); Aronowitz v. Health–Chem Corp., 513 F.3d 1229, 1237 (11th Cir.2008) (contract case); Williams v. Obstfeld, 314 F.3d 1270, 1277 (11th Cir.2002) (RICO case).
>
> FN3. A "vexatious" position is one "without reasonable or probable cause or excuse." Gilbert, 198 F.3d at 1298–99 (quoting BLACK'S LAW DICTIONARY 1559 (7th ed. 1999)) (internal quotation marks omitted).
>
> FN4. A "frivolous" position is "[g]roundless ... with little prospect of success; often brought to embarrass or annoy the defendant." Id. at 1299

> (alteration in original) (quoting BLACK'S LAW DICTIONARY 668 (6th ed. 1990)) (internal quotation marks omitted). This definition means, for me, "frivolous" = baseless. And baseless "in bad faith."

That the Executive Branch's legal position (when viewed objectively) is debatably correct throughout the course of a prosecution is not always sufficient to avoid imposition of Hyde sanctions, if (1) the defendant is completely acquitted, and (2) the judge who tried the case finds that the Government's position, in fact, was motivated by prosecutorial bad faith. Ill will, the touchstone of bad faith, is not a sophisticated or technical concept. I believe that Congress accepted that some prosecutions, in fact, are driven along by things like personal ambition, personal vindictiveness, or politics; and I believe Congress intended those prosecutorial positions to be included within the "or in bad faith" standard of the Hyde Amendment—even when the prosecution is pressed in an objectively reasonable way (not vexatious) and has an objectively reasonable likelihood of success (not frivolous).[FN5]

> FN5. Congress was not being radically innovative. The idea that litigation can be conducted in a manner that is both proper in form and, at the same time, wrongful—because of the bad ulterior motive for which the litigation is used—is no innovative idea in the law. For example, the traditional tort of abuse of process is broadly in line with this idea. And in the specific context of that tort, intent is a question for the fact-finder. See 1 AM. JUR. 2d

Abuse of Process § 24 (2011) ("The existence of an ulterior motive is a question for the jury."); McCollough v. Johnson, Rodenburg & Lauinger, LLC, 637 F.3d 939, 956–57 (9th Cir.2011) (concluding that there was sufficient evidence for the jury to find an ulterior purpose); Warwick Dev. Co., Inc. v. GV Corp., 469 So.2d 1270, 1275 (Ala.1985) (stating that "there was sufficient evidence from which the jury could find that defendants initiated" legal proceedings for an improper purpose).

> I note that, in the legislative history of the Hyde Amendment, Congressman Skaggs read from what he said was a statement from the Executive Branch in opposition to what would, with modifications, later become the Hyde Amendment: the Executive Branch stated that "[the legislation] would create a monetary incentive for criminal defense attorneys to generate additional litigation in cases in which prosecutors have in good faith brought sound charges...." 143 Cong. Rec. H7786–04, H7792 (Sept. 24, 1997) (statement of Rep. Skaggs). I point out that the Executive Branch itself wrote about both "in good faith" and "sound charges": that is, two different, independent, and important ideas were touched upon by the Executive Branch. I believe the resulting Hyde Amendment itself also touches upon different ideas: the idea of different kinds of unsoundness—frivolous or vexatious—and the separate idea of bad faith. I have little doubt that a crafty lawyer can act with improper

> motives and, at the same time, appear to stay technically within the outside borders of the law (or, at least, the debatable law). I expect that Congress and the President had little doubt of it either.

As Congressman Hyde said in the debates about what—with modifications—was to become the Hyde Amendment: "People do get pushed around, and they can get pushed around by their government." 143 Cong. Rec. H7786–04, H7791 (Sept. 24, 1997) (statement of Rep. Hyde). I submit that it is, in part, for these pushing-around cases—the misuse of the browbeating dominance that can come from holding a prosecutorial office—for which the phrase "or in bad faith" was enacted into law in what is called the Hyde Amendment.

The District Judge who presided over the trial in this case and who then ordered the award of Hyde sanctions is an experienced judge with—as far as I know—no history of hostility to the Department of Justice or to prosecutors.

In applying the Hyde Amendment, the District Court entered a published order crowded with thorough findings of fact. See United States v. Shaygan, 661 F.Supp.2d 1289 (S.D.Fla.2009). After a hearing at which he had an opportunity to interrogate the lead prosecutor and the principal criminal investigator as well as other witnesses,[FN6] the District Judge determined, in fact, that bad faith was widely present in the Government's prosecution of Defendant:

> FN6. At the evidentiary hearing, the District Judge observed the demeanor and heard the testimony of the witnesses central to this case, gaining insight into the witnesses' credibility, apparent sincerity, consistency, and a number of other traits. See, e.g., Owens v. Wainwright, 698 F.2d 1111, 1113 (11th Cir.1983) ("Appellate courts reviewing a cold record give particular deference to credibility determinations of a fact-finder who had the opportunity to see live testimony.") (citations omitted). State of mind is a highly subjective matter in which the demeanor of witnesses is of particular significance.

I conclude that the position taken by Cronin [the lead prosecutor] in filing the superseding indictment; initiating and pursuing the collateral investigation based on unfounded allegations; suppressing information about the roles of two key government witnesses as cooperating witnesses in the collateral investigation; and attempting to secure evidence from the collateral investigation that would have jeopardized the trial and severely prejudiced the Defendant, constitute bad faith. These were conscious and deliberate wrongs that arose from the prosecutors' moral obliquity and egregious departures from the ethical standards to which prosecutors are held. Id. at 1321.

The District Court's decision to award Defendant attorney's fees and costs dating back to the time of the Superseding Indictment stemmed from the Court's factual determination that the Superseding Indictment

was the "first manifestation" of the "seismic shift" with which the lead prosecutor (Cronin) had threatened defense counsel. Id. at 1298. According to the District Court, the decision to add 118 counts was "significantly motivated by ill-will." [FN7] Id. And the Court specifically rejected the lead prosecutor's blander explanation for his "seismic shift" comment; the District Court found that it was "not possible to square the threat with a good faith prosecution of this case." Id. at 1294.

> FN7. One problem with the Superseding Indictment itself is that one of the patient/witnesses who was added in the Superseding Indictment flatly denied, at trial, saying the negative things about Defendant that the Government's chief investigator attributed to this witness before the Superseding Indictment was obtained; and the District Judge credited this witness's denial. Shaygan, 661 F.Supp.2d at 1296–97.

For me then, this case ultimately turns on whether the record in this case contains sufficient evidence of bad faith—that is, prosecutorial ill-will—to make the District Judge's fact-finding of "bad faith" not clearly erroneous. I conclude that the record does contain sufficient evidence and that the District Judge's central finding—that the Government's position in this case was "in bad faith" by the time of the filing of the Superseding Indictment—is not clearly erroneous.

I conclude that the evidentiary record is sufficient as a whole to support the Hyde Amendment fact-findings of the District Judge, but I make two

specific observations. First, the District Judge heard the testimony of the lead prosecutor and rejected the prosecutor's explanation. I am aware that we uphold criminal convictions regularly based upon the sufficiency of evidence that proceeds from a criminal defendant's testifying to his innocence. We say—I believe entirely correctly—that a fact-finder is entitled to believe the exact opposite of what a witness testifies to and, then, to treat this disbelieved testimony as substantive evidence of guilt. United States v. Brown, 53 F.3d 312, 314 (11th Cir.1995). I think the same thought process applies here: the prosecutor and the criminal investigator offered explanations for their questionable conduct; the District Judge rejected their explanations and determined that the opposite—a prosecution hammered into shape "in bad faith"—was the truth.[FN8]

> FN8. This determination was not simply a matter of disbelief. The record reflects many irregularities in the Government's handling of this case. For example: the magistrate judge, in recommending that the District Court grant Defendant's motion to suppress, found the testifying DEA agents—including the principal criminal investigator—to lack credibility (and the District Court accepted that magistrate judge's recommendation); the Government has admitted to multiple discovery violations; and the Government not only conducted an improper investigation of defense counsel, but kept this investigation from the District Court until the Government's hand was forced by the revealing testimony of one Government witness. Plenty of

evidence in the record corroborates the District Court's finding of a prosecutorial position of bad faith and its finding that the prosecutor and criminal investigator lacked credibility.

> By the way, no party to this case contends that the first Indictment in this case was filed in bad faith. I understand the Government not to dispute that, as a matter of law, the manner of advancing a prosecution can make the Government's position in that prosecution a position "in bad faith," even when the initial Indictment was not "in bad faith." But whether the Government does or does not accept this legal proposition, I do. Moreover, the Government, by its very nature, can act only through agents who represent it, such as its Assistant United States Attorneys prosecuting criminal cases. The word "position," as used in the Hyde Amendment, can easily apply to the way in which the Government conducts the prosecution, including the ill-will state of mind that a prosecutor's acts evidence; this definition is not a strained use of the word "position." The Oxford English Dictionary defines "position" as "[m]ental attitude; the way in which one looks upon or views a subject or question." XII OXFORD ENGLISH DICTIONARY 165 (2d ed. 1989). To me, in this sense the word "position" echoes Congress's use of the phrase "in bad faith" in the statute.

Second, the Department of Justice does not contend that this prosecution proceeded entirely properly. In fact, the Department of Justice conceded and offered to pay—in the United States Attorney's words, "pursuant to the Hyde Amendment"—some attorney's fees and litigation expenses: those stemming from the secret tape-recording of the defense team.[FN9]

> FN9. A concession by the Government is not critical to my analysis of, or my conclusion in, this appeal. The Government, however, did put into writing to the District Court that the Government "acknowledges and deeply regrets that it made serious mistakes in a collateral investigation that was an offshoot of this case and stands ready to pay the additional attorneys' fees and costs incurred by the defendant as a result." The same Government brief later says to the District Court that "the United States Attorney has decided, on behalf of the government, to waive any legal defenses pursuant to the Hyde Amendment, and thus not contest payment pursuant to the Hyde Amendment, of the defendant's attorneys' fees and costs associated with litigating the motions to dismiss and for sanctions." Considering how the adversarial process played out in the District Court, that some fees and expenses could be awarded to Defendant was not contested when the matter of Hyde Amendment payments was submitted for decision to the District Court.

But the Department does not want to pay fees and expenses dating back to the Superseding Indictment. Given that the Government does not dispute that the prosecutor in this case did things that ought not to have been done and that would justify Hyde Amendment fees and expenses at some point, it seems to me that the only serious inquiry in this case is when the liability for fees and expenses should start: a fact question of where to draw the line. Pursuant to Rule 404(b), we routinely allow evidence of other crimes and wrongs to show the bad motive and bad intent that accompanied a criminal defendant's conduct as he did something else. FED.R.EVID. 404(b). Especially applying the rationale of 404(b), it seems to me that the District Court had ample support to think that the filing of the Superseding Indictment was motivated by the same bad faith as the later acts of discovery violations and improper investigation of the defense team.[FN10] So, the District Court's starting the fees at the time of the Superseding Indictment seems to have a more-than-adequate factual basis.

> FN10. I know that Hyde Amendment sanctions are not available where the Government's bad faith is limited to isolated incidents. Accord United States v. Schneider, 395 F.3d 78, 90 (2d Cir.2005) ("[T]he [Hyde Amendment] does not allow an award for [just] any instance of vexatious, frivolous, or bad-faith conduct."). The statute speaks of "the position of the United States"; and so we will uphold an award under the Hyde Amendment only when the Government's handling of a prosecution is so substantially vexatious, frivolous, or in bad faith

> as to characterize the Government's overarching position in the case. We ignore trifles. We view a case in which Hyde sanctions have been awarded with a wide lens, looking at the Government's position as a whole. The Superseding Indictment, the inappropriately conducted investigation of defense counsel for the purpose of disqualifying them on the eve of trial, and the disobedience of proper discovery rules and so forth are significant and show a course of dealing; and the District Court was justified in finding that the spiteful manner in which the prosecutors conducted this prosecution amounted to the Government's position in this case.

The Government says that the Superseding Indictment was not significantly tainted by personal vindictiveness or another kind of bad faith. The Government says—as did the lead prosecutor—that the Superseding Indictment was the result of further investigation that led the prosecutors to find other persons who could testify to Defendant's criminal conduct. Rejecting the prosecutor's explanation, the District Judge, among other things, found: "The patients that were included in the Superseding Indictment were known to the Government long before the motion to suppress was litigated, yet no Superseding Indictment was sought at an earlier time." Shaygan, 661 F.Supp.2d at 1298.

The Government argues that this statement is clearly erroneous. The Government says that it is not true that all of the specifically named people—specific

patients of Defendant—added in the Superseding Indictment were known to the Government earlier.

I do not read the District Court's sentence the same way as the Government does, and I am confident that the sentence need not be read the way the Government reads it. I think the District Judge was saying (1) that the Government's prosecutor was well aware, before the motion to suppress was even filed, that Defendant had other patients (a class of other potential witnesses that were out in the world);[FN11] and (2) that the Government's prosecutor took no action to find any of these other potential witnesses until the prosecutor became distressed and angry with defense counsel because of the motion. The Government concedes it was on account of the motion to suppress and its allegations—that certain DEA agents had lied—that the prosecutor threatened defense counsel with a "seismic shift" in how the Government was going to proceed in the prosecution.

> FN11. I submit that it is significant that the Government obtained Defendant's day planner when Defendant was arrested: more than three months before the motion to suppress was even filed. This day planner contained the names of several of Defendant's patients—and led the Government to still other patients—who were later named in the Superseding Indictment.

So, it may be true that the prosecutor, long before the Superseding Indictment, did not know specifically the identity of witness X, Y, or Z. I do not think that the District Judge was necessarily saying that the

prosecutor did know those details. But the prosecutor did know that there were very likely people like X, Y, or Z who were in existence and who likely could be found; and until the prosecutor became angry and hostile towards defense counsel, these witnesses were not actively looked for. I think the District Judge was making the latter observation about what the prosecutor knew when the District Judge says, "[t]he patients that were included in the Superseding Indictment were known to the Government long before...." Id. Therefore, what the District Judge said—even in this one isolated sentence contained in a long and detailed order—is not truly clearly erroneous.

At times, I get the sense that the concern with applying the Hyde Amendment to this case is a worry that the resulting precedent will, in some way, open the floodgates to the Executive Branch's being hit with attorney's fees whenever the Executive Branch loses a criminal prosecution. I think this flood is improbable. I submit the first thing to realize is that the Executive Branch hardly ever loses a criminal prosecution.[FN12] Therefore, the idea of a flood is, to my way of thinking, pretty theoretical.

> FN12. From 2000 to 2009, the percentage of defendants who were ultimately convicted in a given year ranged from 88.57% to 90.70%. Dept. of Justice, Bureau of Justice Statistics, (Defendants in criminal cases closed: Trends, FY 2000–2009, Verdict or outcome of trial: All values, Percents), http:// bjs. ojp. usdoj. gov/ fjsrc.

Moreover, the Hyde Amendment is not a "loser pays" law. The burden is on the prevailing defendant to prove that a prosecution was "vexatious, frivolous, or in bad faith." Placing the burden on the acquitted defendant made recovery of expenses and fees in criminal cases inherently more difficult than under the EAJA, where the burden is on the Government. Furthermore, the fact of an acquittal, in and of itself, is no evidence that the Government's position was vexatious or frivolous or in bad faith. In addition and apart from everything else, the statute itself allows a District Judge to withhold expenses and attorney fees whenever circumstances would make such an award "unjust." [FN13] No good reason exists to believe that United States District Judges are going to make awards under the Hyde Amendment lightly. [FN14] I also think the facts of prosecutorial misconduct in this case—as found by the District Judge—are exceptionally troubling: I do not believe we will often see cases involving fact-findings for this sort of extensively manifested prosecutorial ill will toward the defendant and defense lawyers. [FN15]

> FN13. About sovereign immunity, if too much money starts being paid by the Department of Justice pursuant to court orders under the Hyde Amendment, Congress can amend the statute (for example, cap the fees or rewrite the qualifying standards) or repeal the statute altogether, withdrawing the waiver of sovereign immunity. In the meantime, all I know to do is to read the text of the statute, giving the words what I understand to be their ordinary meaning.

FN14. I do not accept that reading the statutory language "in bad faith" as an issue of subjective intent makes it too easy for fees to be awarded or, in some way, makes "bad faith" an easier standard to prove than an objective standard like "frivolous." See, e.g., Jackson v. Walker, 585 F.2d 139, 143 (5th Cir.1978) ("[I]t is difficult to prove in court the actual state of mind of a prosecutor during his exercise of discretion.") (habeas case, involving claim of unconstitutional vindictiveness). I think District Judges are more likely to attribute questionable prosecutorial positions to good faith but—unreasonably or reasonably—mistaken decisions.

FN15. Enormously troubling is the fact, found by the District Court, that the Government pressed its investigation of the defense team "for the bad faith purpose of seeking to disqualify the defense lawyers for conflict-of-interest immediately prior to trial." Shaygan, 661 F.Supp.2d at 1310. The District Court wrote that, if this objective had been realized, it would have been "catastrophic" for Defendant. Id. at 1311. In addition to the effort, trouble, and expense inherent in replacing Defendant's chosen lawyers who already knew his case, delay of the trial would have been against Defendant's other interests: he was not free while awaiting trial, but was instead confined to his home under strict condition of house arrest. I do not expect the courts will often see conduct that would suggest this level of prosecutorial malice toward a defendant and his lawyers.

I disagree with the idea that, if the Department of Justice and its lawyers are under the supervision, in some way, of federal judges—when the Department of Justice and its lawyers are actively engaged in litigating a case before a United States Court—a violation of the separation of powers is looming. I am inclined to think just the opposite. For me, it is the instances of the treating of the Department of Justice and its prosecutors differently from—and better than—other litigants that threaten the separation of powers between the Judicial Branch and the Executive Branch. But to decide the present case, I think that we need not dispute about the concept of separation of powers at a high level of abstraction.[FN16]

> FN16. By the way, the phrase "the separation of powers" never appears in the Department of Justice's brief, and the Department has never argued anything about that kind of issue.

In this case, the District Judge did not attempt to exercise some inherent power of the judiciary to assess attorney's fees and expenses against the Executive Branch (although the District Judge did invoke this inherent power to reprimand publicly individual prosecutors). In assessing fees and expenses, the District Judge acted pursuant to a statute that was enacted by Congress and signed into law by the President. This fact in itself might not answer any and all possible questions about separations of powers for every case, but I think it goes so far that we need not worry much about it to decide this case.

To end as I began, I believe this case is about statutory construction. Based on the text of the statute, I believe that the phrase "or in bad faith" was intended to reach prosecutions conducted in a manner that was motivated by—and that demonstrated—personal vindictiveness, personal ambition, politics, and so on.

A high-minded prosecutor, with a clean heart, can still commence a "frivolous" prosecution or conduct a prosecution in a "vexatious" way, if the prosecutor's acts are objectively unreasonable: in this way, the Hyde Amendment can be triggered. More important for this case, even IF a prosecutor's acts are objectively reasonable, the Government's position can be "in bad faith" if the prosecutor acts with ill will: in this way as well, the Hyde Amendment can be triggered.

I believe the record in this case allowed the District Judge to find, as a matter of fact, that the prosecutor's personal vindictiveness prominently marked the Government's position as the prosecution against Defendant went forward. Therefore, I would affirm the Hyde Amendment award.

I agree that the individual sanctions against Mr. Cronin and Ms. Hoffman were entered without proper notice and process. I also agree that insufficient reason exists to remove the District Judge from this case on remand.

661 F.Supp.2d 1289
(Cite as: 661 F.Supp.2d 1289)

United States District Court,

S.D. Florida.
UNITED STATES of America, Plaintiff,
v.
Ali SHAYGAN, Defendant.
Case No.: 08–20112–CR.

April 9, 2009.
As Amended April 14, 2009.

Sean Paul Cronin, Andrea G. Hoffman, Arimentha R. Walkins, Edward N. Stamm, United States Attorney's Office, Miami, FL, for Plaintiff.

ORDER ON DEFENDANT'S MOTION FOR SANCTIONS UNDER HYDE AMENDMENT

ALAN S. GOLD, District Judge.

I. GENERAL BACKGROUND

THIS MATTER is before the Court on the Defendant Ali Shaygan's Motion for Sanction [DE 287] pursuant to the Hyde Amendment and for other miscellaneous relief. 18 U.S.C. § 3006A. The United States has filed a response [DE 299] acknowledging that the United States "made serious mistakes in a collateral investigation that was an offshoot of this case and stands ready to pay the additional attorneys' fees and costs incurred by the defendant as a result."

[DE 299 at 1, 2].

The United States acknowledges that it initiated a collateral investigation into witness tampering and authorized two witnesses, Carlos Vento and Trinity Clendening, to tape their discussions with members of the defense team in violation of United States Attorney's Office policy; that, although there were efforts made to erect a "taint wall," the wall was imperfect and was breached by the trial prosecutors, AUSA Sean Paul Cronin and Andrea Hoffman, at least in part, because the case agent, DEA Special Agent Christopher Wells, was initially on both sides of the wall; and that, because the United States violated its discovery obligations by not disclosing to the defense "(a) that witnesses Vento and Clendening were cooperating with the government by recording their conversations with members of the defense team, and (b) Vento's and Clendening's recorded statements at the time of their trial testimony." Finally, the United States "acknowledges and regrets" that, "in complying with the Court's pre-trial order to produce all DEA–6 reports for in camera inspection on February 12, 2009 (Court Ex. 6), the government failed to provide the Court with the two DEA–6 reports regarding the collateral investigation, specifically Agent Wells' December 12, 2008 report (Court Ex. 2) and Agent Brown's January 16, 2009 report (Court Ex. 3)." [DE 299 at 2, 3].

The United States' position is that none of these mistakes were done in "bad faith" and that immediate efforts were taken to investigate, report and rectify the matter once it came to light during the

cross-examination of Trinity Clendening. Accordingly, the Government argues that the payment of fees and costs associated with the entire prosecution is not warranted under the Hyde Amendment. In his reply, Defendant argues that while the United States has acknowledged some degree of misconduct, it fails to concede that various actions taken by the prosecution team were motivated by ill will and personal animus. Defendant argues, therefore, that the United States' concession of liability under the Hyde Amendment is too narrow and that the payment of fees and costs from the date of the Superseding Indictment was filed in this case is warranted. [DE 309].

On March 12, 2009, after a four-week trial, the jury rendered a "not guilty" verdict on all one-hundred and forty-one (141) counts of the Superseding Indictment within three hours of deliberation. On March 16 and 17, 2009, following the jury's verdict, I held an evidentiary hearing ("Sanctions Hearing") on the Defendant's Motion for Sanctions. At the Sanctions Hearing, the following witnesses testified: Michael Graff, the defense investigator; Courtney Beth Tucker, the witness whose telephone call to DEA Special Agent Wells triggered the collateral investigation; DEA Special Agents Christopher Wells and James Brown; and AUSA Karen Gilbert and Sean Cronin.

II. SUMMARY OF ORDER

I begin by acknowledging that the United States has acted responsibly, in part, by offering to pay the reasonable attorney's fees and costs associated with Dr. Shaygan's motions to dismiss and for sanctions, and by

referring this matter to the Department of Justice's Office of Professional Responsibility on March 6, 2009 for an independent investigation and recommendations regarding disciplinary actions. I also acknowledge that the United States Attorney and his senior staff members had no direct knowledge of the events that I will describe.[FN1] Finally, I agree that the original indictment in this case was filed in "good faith," especially given the circumstances surrounding the death of Dr. Shaygan's patient, James Downey.[FN2]

> FN1. The Defendant has acknowledged that "United States Attorney R. Alexander Acosta, First Assistant Jeffrey Sloman, and Criminal Chief Robert Senior have responded to this matter with both integrity and candor." [DE 250 at 13 n. 4].
>
> FN2. The problem with medical clinic "pill mills," and deaths resulting from overdoses of oxycodone, methadone and other narcotics prescribed by pain clinic doctors, has become rampant. As noted recently in the Miami Herald, "Broward County has become the painkiller capital of the United States, the notorious home to a cottage industry of storefront pain clinics selling alarming numbers of narcotics and feeding a brazen black market sprawling from the South and New England." Miami Herald, April 5, 2009, at 1A. The Herald reported that " '[T]he rate of overdoses is just incredible ... It is the new epidemic of drug abuse.' " Id. at 22A. Accordingly, nothing in this Order is intended to dissuade vigorous

> prosecution against "pill mill" doctors who are no more than "sellers" of narcotics under the guise of a prescription. This important end, however, does not "justify the means" when the means involve vexatious and bad faith prosecutorial misconduct.

Nonetheless, I enter a public reprimand against: (1) the United States Attorney and his senior staff members, for failure to exercise proper supervision over AUSA Karen Gilbert, the head of the Narcotics Section of the United States Attorney's Office; (2) AUSA Gilbert and her deputies for acting with gross negligence with regard to the events which ensued; and (3) the two prosecutors assigned in this case, AUSA Sean Paul Cronin and Andrea G. Hoffman. I conclude, without doubt, that AUSA Cronin, with the assistance of AUSA Hoffman, along with DEA Special Agent Christopher Wells, acted vexatiously and in bad faith in prosecuting Dr. Shaygan for events occurring after the original indictment was filed and by knowingly and willfully disobeying the orders of this Court. These lawyers are publically reprimanded and shall be sanctioned, as set forth in this Order.[FN3]

> FN3. The United States has advised that "AUSA Gilbert has voluntarily resigned as Chief of the Narcotics Section, and AUSA Cronin voluntarily requested a transfer out of the Criminal Division." [DE 299 at 4].

The events surrounding the prosecution of Dr. Shaygan are described in detail in this Order. These events are profoundly disturbing. They raise troubling

issues about the integrity of those who wield enormous power over the people they prosecute. As stated in a recent editorial in the Miami Herald, "How many times does it need to be said? The job of prosecutors is to obtain justice, not merely to secure convictions." Editorial, Miami Herald, April 3, 2009, at 14A (addressing the case against former Alaska Senator Ted Stevens). I concur with the Herald's sentiment in that it embodies the essence of the oft-quoted words of Justice Sutherland in Berger v. United States, which are set forth at page 27 below.

Therefore, I write in detail to make clear what happened here because it is necessary to get to the bottom of what went wrong. I do so in hope that it will not happen again. Our system of criminal justice cannot long survive unless prosecutors strictly adhere to their ethical obligations, avoid even the appearance of partiality, and directly obey discovery obligations and court orders. Of fundamental importance, the United States may not callously invade the sanctity of a defendant's Sixth Amendment right to counsel, in an ongoing prosecution, by engaging in collateral witness tampering proceedings involving the defense lawyers and investigators without strictly complying with all constitutional and related guarantees.

Initially, it is the responsibility of the United States Attorney and his senior staff to create a culture where "win-at-any-cost" prosecution is not permitted. Indeed, such a culture must be mandated from the highest levels of the United States Department of Justice and the United States Attorney General. It is equally important that the courts of the United States must let

it be known that, when substantial abuses occur, sanctions will be imposed to make the risk of non-compliance too costly.

For reasons stated in this Order, I grant full relief under the Hyde Amendment and impose individual sanctions against AUSA Cronin and Hoffman. I order the United States to reimburse the Defendant for his entire attorney's fees and costs in this case from the date of the filing of the Superseding Indictment. Based on the information submitted by the defense, the actual amount of fees incurred since the filing of the Superseding Indictment for work performed totaled over $1,074,300.00. With adjustments as required by the Hyde Amendment, the United States is ordered to pay attorney's fees in the amount of $493,764.00 and other litigation expenses, including expert fees and costs, in the amount of $108,031.88, for a total award of $601,795.88.

Besides the public reprimand, I also enjoin the United States Attorney's Office for the Southern District of Florida from engaging in future witness tampering investigation of defense lawyers and team members in any ongoing prosecution before me without first bringing such matters to my attention in an ex parte proceeding. The United States Attorney also shall report his efforts toward enhanced supervision of his attorneys, and all changes to the "taint wall" policies within the United States Attorney's Office and the Drug Enforcement Administration.

III. FINDINGS OF FACT

1. On February 8, 2008, the United States filed an indictment [DE 3] against Dr. Ali Shaygan, setting forth 23 counts alleging that Dr. Shaygan distributed and dispensed controlled substances outside the scope of professional practice and not for a legitimate medical purpose, in violation of 21 U.S.C. § 841(a)(1) et seq. Also included was one count alleging that such distribution resulted in the death of James Brendan Downey. Id. At the time of the original indictment, the 23 counts addressed prescriptions written only to James Brendan Downey and two undercover officers, Matthew Drake and Paul Williams. The lead prosecutor at the time of the filing of the indictment was AUSA Sean Paul Cronin. He was assisted by AUSA Andrea G. Hoffman.

2. This was not AUSA Cronin or Hoffman's first encounter with members of Dr. Shaygan's defense team. In early 2008, co-counsel Marc Seitles represented defendant Evelio Conde in United States v. Conde, Case No. 07–20973–CR–ALTONAGA. Although the Conde case was unrelated to Dr. Shaygan's, the prosecutors were the same (AUSA Cronin and Hoffman) as in this case. After what was characterized as an "acrimonious trial," Mr. Conde was acquitted of all charges. Shortly after, AUSA Cronin and Hoffman filed a complaint alleging that Mr. Conde engaged in witness tampering. According to Cronin, allegations of witness tampering had surfaced prior to trial but there had not been sufficient time to seek a separate indictment or supersede the existing indictment. [Transcript of

March 17, 2009 hearing (Tr. Mar. 17), 162:5–24]. Following a meeting between Mr. Seitles with senior members of the United States Attorney's Office ("USAO"), the case was dropped without an indictment. At the meeting, the defense characterized the charges as "frivolous." After the Conde case was dismissed, relations between the prosecutors and the Shaygan defense team became increasingly strained.

3. On February 11, 2008, DEA Special Agents arrested Dr. Shaygan. Pursuant to a search warrant, they searched his home, and, with his consent, also searched his office. DEA agents interrogated him and subsequently prepared a DEA–6 reflecting Dr. Shaygan's purported statements. The DEA–6 omitted any reference to Dr. Shaygan's questions or statements relating to his right to counsel. The defense team advised AUSA Cronin about the omission.

4. On May 14, 2008, the Defendant filed a Motion to Suppress, alleging, in part, that the interrogation was in violation of his Miranda rights because the DEA agents ignored his request for counsel. The motion also claimed that, while two agents stood guard, "a third agent came in and out of the room several times interrogating [the Defendant], using scare tactics and repeatedly made clicking noises with his firearm ... [and] that same agent brandished his firearm in front of Dr. Shaygan, intimidating him." [DE 68 at 2]. The defense later abandoned this position, but the assertion added acrimony to the relationship between the defense team and the prosecutors.

5. On May 29, 2008, the Government, through AUSA Cronin, filed a responsive memorandum, asserting that Dr. Shaygan did not in fact "unequivocally" invoke his right to counsel. [DE 76]. Instead, the Government claimed, for the first time, that, after the arrest, the Defendant asked "should I call my attorney?" Or, "don't I need to call my attorney?" According to Mr. Cronin, DEA Wells advised the Defendant that he absolutely had a right to his attorney and also advised that "in no way would he be denied his right to an attorney," and that "... he could invoke his right to an attorney and not answer any questions, or he could instead cooperate with law enforcement and answer their questions." Id.

6. On July 31, 2008, the parties participated in a discovery conference at the High Intensity Drug Trafficking Area ("HIDTA") field office, during which AUSA Cronin warned David Markus, Shaygan's lead attorney, that pursuing the suppression motion would result in a "seismic shift" in the case because "his agent," Chris Wells, did not lie. AUSA Cronin did not elaborate at the meeting what a "seismic shift" actually meant or why he would make such a statement. At the Sanctions Hearing, AUSA Cronin explained that he and Agent Wells had worked on numerous cases together and shared a friendship. [Tr. Mar. 17, 132:1–11]. He claimed that his "seismic shift" statement was meant to indicate that his "happy-go-lucky" attitude with lead defense lawyer David Markus would go away and his level of cooperation would diminish. [Tr. Mar. 17, 113:25–114:11]. I do not credit AUSA Cronin's

explanation and, instead, I find that the use of the phrase "seismic shift" was a harbinger for events to come. Virtually all actions undertaken by Cronin throughout the remainder of the prosecution demonstrated the aftershocks of the seismic shift. Even if construed narrowly, it is not possible to square the threat with a good faith prosecution of this case.

As it turned out, David Markus and Marc Seitles later met with AUSA Jeffrey Sloman and Tony Gonzalez, Mr. Cronin's supervisors, to complain about the personal animus against them by AUSA Cronin. [Tr. Mar. 17, 94:12–19]. This occurred a few days before the commencement of trial. Id. No action was taken by the USAO to investigate their complaints. At no time did Cronin advise AUSA Sloman about the recording of the defense investigator.

7. U.S. Magistrate Judge Chris M. McAliley held two hearings on the Motion to Suppress. As noted in the Magistrate's Report and Recommendation [DE 150], filed November 17, 2008, DEA Special Agent Chris Wells, the case agent, was the Government's primary witness. The Magistrate Judge found that although Wells prepared a lengthy DEA–6 report of the events surrounding the arrest of Dr. Shaygan on February 11, 2008, he made no mention of any inquiry by Defendant regarding counsel, including AUSA Cronin's claim that Dr. Shaygan had asked Wells whether he needed a lawyer. At the suppression hearing, Wells could not remember the exact words used by the Defendant [DE 150 at 4]. Magistrate

Judge McAliley ultimately concluded on November 17, 2008 that Dr. Shaygan's post-arrest interrogation should be suppressed because he had invoked his right to counsel. She credited the recollection and testimony of a third party witness over that of DEA Agent Wells. Moreover, the Magistrate Judge found that the "credibility of their recollection [DEA Agents Wells and Aleman] is undermined by the fact that, rather than being interviewed and prepared separately [by Mr. Cronin] to testify at the suppression hearing, government counsel [Cronin] prepared the agents together for the hearing." Id. at 16. Thus, the Magistrate Judge found "... the quality of the agents' recollection is not particularly reliable." Id.

On December 5, 2008, AUSA Cronin filed a twenty-one page objection to the Magistrate Judge's Report and Recommendation [DE 159], arguing that "the unimpeached testimony of law enforcement officers establishes that the Defendant did not invoke his right to counsel," and that "in discounting the memories of these two agents, the Magistrate Court erroneously based [her] findings on incorrect assumptions not supported by the record." Id. at 2, 5. Upon de novo review, I adopted and affirmed the Magistrate Judge's Report and Recommendation in its entirely on January 13, 2009 [DE 192].

In retrospect, and in light of the evidence at the Sanctions Hearing, what I find compelling and disturbing is (a) DEA Special Agent Wells did not acknowledge in the DEA–6 that Dr. Shaygan invoked his right to counsel in any manner, even though

AUSA Cronin eventually had to concede that those words were uttered in some form; (b) the words AUSA Cronin eventually conceded were uttered, as supported by Well's testimony at the suppression hearing, conveniently fitted the case law cited by Cronin that the utterance was "equivocal," and (c) the Magistrate Judge indirectly admonished AUSA Cronin for preparing the agents together, finding the quality of the agents' recollection not to be particularly reliable; in other words, not credible as compared to an independent witness.

8. Throughout the case, the defense requested Brady material. See [DE 66]. On August 8, 2008, Magistrate Judge McAliley issued an order expressing concern about a position taken by Mr. Cronin on a Brady matter (the details of which are not of concern). The Magistrate Judge commented:

> "The problem with the government's request in its sealed pleading—that the Court not reveal to the Defendant that there is no report [i.e. an interview report of a doctor]—is that it would require this Court to engage in deception. The government led the Defendant (and anyone else who might be following the public record of these proceedings) to believe that it would give the Court an interview report of Dr. Loucas, and the Court told the parties that it would inform them whether any part of that report must be disclosed as Brady material. Also, the Court has before it the pending Brady motion, and at the close of the status conference it advised the parties it would issue a written order resolving the one remaining issue from that motion, once it

made the in camera review to which the parties agreed. Thus, the Court cannot remain silent on the matter .... The Court is unwilling to do this." [DE 103 at 3–4] (emphasis added).

9. In the meantime, the investigation progressed. On July 29, 2008, DEA Agent Wells interviewed Carlos Vento and subsequently prepared a DEA–6. On August 8, 2008, Wells interviewed Trinity Clendening, and a week later, he interviewed Courtney Tucker. [DE 270–2, ¶ 5; Vento DEA–6 (Jul. 29, 2008), Clendening DEA–6 (Aug. 8, 2008), Tucker DEA–6 (Aug. 15, 2008)]. According to the DEA–6 reports, the interviews of both Vento and Clendening stated that the Defendant offered to pay for their silence regarding the circumstances surrounding Downey's death. Both reports stated that, although Vento did not ask Dr. Shaygan for money, he asked for free prescriptions and also told Dr. Shaygan that he did not want to pay for future office visits for prescriptions.

10. The DEA–6 prepared by Wells of his August 15, 2008 interview with Tucker contained positive statements about Dr. Shaygan. Specifically, Wells wrote that as to her initial appointment with Dr. Shaygan, Tucker "brought her MRI and other medical records with her for Shaygan to review;" "Shaygan conducted a thorough examination to include flexibility exercises" and performed a urinalysis test; and that "Shaygan seemed very interested in her well being." Tucker's fiancé Wayne McQuarrie also had an appointment with Dr. Shaygan that day and "Tucker stated Shaygan also

conducted a thorough examination of McQuarrie." Throughout these proceedings, Cronin claimed these positive statements were not Brady material. I find, however, that they are clearly Brady.

The DEA–6 also contained many more negative statements. According to Wells, Tucker was "not happy" about a fee increase for visits with Shaygan; that her meetings with Dr. Shaygan "became shorter and shorter;" and his interest in her well-being decreased as time passed. Moreover, Wells wrote that Tucker agreed with the statement that Dr. Shaygan "seemed to become more interested in making money than addressing her medical condition or improving her overall health during the year and a half that she purchased prescriptions from him." [Tucker DEA–6, supra]. At trial, Tucker, who was called as a witness by the Government in its case-in-chief, denied making any such statement when AUSA Hoffman attempted to impeach her testimony with 1297 what was in the DEA–6. [Trial Tr., Feb. 26, 2009, 75:23–76:1] (Hoffman: "Do you recall telling agents that he (Shaygan) was more interested in making money than in improving the overall health of your condition over the year you purchased medicine from him?" Tucker: "No,") I find Ms. Tucker's testimony at trial and at the Sanctions Hearing to be more credible than Wells' DEA–6 report.

11. On August 20, 2008, five days after she was interviewed by DEA Agent Wells, defense investigator Michael Graff contacted Courtney Tucker by phone for eleven minutes and immediately sent to the defense team an email documenting his

conversation with her. He characterized Tucker as "awesome" and recounted Tucker's complaints about her August 15, 2008 interview with DEA Agent Wells. Most of the conversation concerned her complaints about Wells. She specifically indicated Wells was "throwing around his weight," "strong armed her," tried to put a "negative spin" on her statements, and "kept trying to put words in her mouth." Moreover, Tucker expressed concern that Agent Wells had implied that she was "addicted to pain meds" and "did favors for [Shaygan] in return for scripts." Tucker was insistent that she was not addicted but had legitimate needs for the medications. According to Graff's email, Tucker's recollection presents a different picture of her opinion of Dr. Shaygan than was depicted in the DEA–6. Tucker believed and expressed to the DEA that she had "absolutely nothing but the most positive things to say about Ali as a person and a physician," that Dr. Shaygan was "extra professional and extra caring of his patients [sic] well-being," and that his exams "were always thorough." In sum, Graff noted that Tucker had "the most positive things to say about Ali and was very turned off by the DEA and their tactics." [Def. Ex. 1]. This was Graff's last direct contact with Tucker.

12. As of this initial contact between Graff and Tucker, Tucker had not yet been named in the indictment against Dr. Shaygan.

13. Graff next attempted to contact Tucker on August 27, 2008. He spoke with McQuarrie instead, who according to Graff's customary follow-up email, stated

that Tucker "highly doubts the DEA will bother Courtney again because she is so pro-Shaygan" and "Courtney will do whatever it takes to help Shaygan." Finally, in mid-October, Graff was able to set up an in-person interview between Tucker and Robin Kaplan, a member of the defense team, which took place on October 23, 2008. As coordination of this meeting was Graff's ultimate goal, he had no further contact with Tucker. [Transcript of March 16, 2009 hearing (Tr. Mar. 16), 12:24–14:2; Def. Ex. 2].

14. At the meeting with Ms. Kaplan, Tucker recounted her interview with Wells. Tucker told Kaplan, consistent with her testimony at the Sanctions Hearing, that Wells made her feel threatened, that he put a "negative spin on all the nice things that I thought [Shaygan] did." [DE 297–2 at 7, 8]. None of the defense lawyers contacted Tucker again after the in-person interview.

15. I find Graff's emails, and his related testimony at the Sanctions Hearing, are credible and accurate for a number of reasons. I categorically reject that Graff told Tucker at any time that the Government would be attempting to portray her as a drug abuser during trial, and that she was possibly subject to federal prosecution based on her involvement with the Defendant (compare Well's statement in Paragraphs 18 and 19 below). My reasons include that (a) Graff had no reason to make such a statement in that Tucker already was a favorable witness to the defense; (b) Graff's email summarizing his call with Tucker was contemporaneous with the conversation with her and accurately reported their conversation;

(c) Graff did not make any such statement to Vento or other witnesses; (d) Graff's email recounting his call with Vento was identical in content to the Vento recording, lending credibility to the accuracy of the Tucker email (compare Court's Exhibit 1 with Def. Exhibit 3); (e) Tucker reported no such statements to Kaplan during the October 23, 2008 in-person interview, and she testified at the Sanctions Hearing that she had no recollection of any concerns regarding Graff's telephone call to her [Tr. Mar. 16, 59:10–16]; and (f) Graff had no reason to contact Tucker after the Kaplan interview.

16. On September 26, 2008 a Superseding Indictment was filed containing 141 counts against Dr. Shaygan. Besides James Downey and the two undercover officers, the Superseding Indictment named as additional victims Carlos Vento, in Counts 26–33, Trinity Clendening in Counts 34–39, Courtney Tucker in Counts 40–80, Wayne McQuarrie in Counts 81–112, Andrew Gribben in Counts 113–129, and David Falcone in Counts 130–141. [DE 124; DE 270–2, ¶ 4]. As of the date of the Superseding Indictment, the Government had not been able to find, let alone speak to, David Falcone.

I find that the first manifestation of the "seismic shift" was the filing of the Superseding Indictment, which took place after the commencement of the hearing on the motion to suppress. The patients that were included in the Superseding Indictment were known to the Government long before the motion to suppress was litigated, yet no Superseding Indictment was sought at an earlier time. While

AUSA Cronin claimed that the filing of the Superseding Indictment was innocuous, because it did not expose Dr. Shaygan to the risk of a greater sentence, I find the effect of the Superseding Indictment was to greatly increase the time and cost of the trial. The adding of 115 more counts resulted in the defense having to request additional continuances which kept Dr. Shaygan under strict conditions of house arrest. It also added to the "weight" of the indictment and the seriousness of the offenses as presented to the jury. The strong inferences support that the decision to file the Superseding Indictment was significantly motivated by ill-will.

17. Although the Superseding Indictment was not filed until September 26, 2008, Courtney Tucker and Wayne McQuarrie received subpoenas on September 17, 2008 to testify as government witnesses at trial which was specially set by court order to commence on Tuesday, February 17, 2009.

18. On November 21, 2008, Courtney Tucker left a voice message for Agent Wells, who immediately returned her call. They spoke for ten minutes. While Tucker could not remember at the Sanctions Hearing the specific reason why she called Wells, it is more likely, given her positive commentary about Dr. Shaygan in her previous interview with the DEA, she was confused as to why [Tucker and McQuarrie] would be called to testify on the prosecution side. At the Sanctions Hearing, she stated that she spoke to Wells in an agitated manner and said: "I was confused as to why, after I met with Agent Wells ...

why we would be testifying for the prosecution." [Tr. Mar. 16, 61:13–22]. She further stated: "I wanted to find out what the motivation was." She felt, "if anything, we would be on the defense side." [Tr. Mar. 16, 63:2–63:9, 67:7–68:25]. She wanted reassurance from Agent Wells that the Government or anyone else would not portray her and McQuarrie as drug abusers or addicts. Id. When asked at the Sanctions Hearing who said that (portray as drug abuser or addicts) to her, she stated: "I don't recall who. I was talking with Wayne about it. I don't know whether he had heard that or what or whether Wayne and I just in conversation, that we were discussing it with one another, and then ... I called Agent Wells to see if that was the case or not because I couldn't understand what was happening." [Tr. Mar. 16, 64:10–16].

She denied saying to Agent Wells that the defense investigator said she would be subject to federal prosecution because of her involvement with Dr. Shaygan. [Tr. Mar. 16, 65:15–23]. She said she would have recalled making such a statement. Id.

I find credible that Tucker did not tell Agent Wells that the defense investigator or anyone else from the defense team had tried to intimidate her in any manner, had warned her that she would be subject to federal prosecution, or told her that the government would attempt to portray her as a drug abuser. To the contrary, the Government's portrayal of her as a drug abuser or addict was a concern she had on her own. [Tr. Mar. 16, 64:21–65:23]. Moreover, when she voiced her concern that the Government would

portray them negatively, Wells said it would be the defense team that would seek to do so. [Tr. Mar. 16, 74:19–75:10] ("Did you tell him (Wells) that the defense was doing anything to harass you, make you feel uncomfortable to anything like that at all" Tucker: "No." Markus: "Did you express your concern to him (Wells) about the way they (the Government) might portray you at trial?" Tucker: "Yes." Markus: "And what did he tell you about the defense on that phone call?" Tucker: "That they—that you guys would actually—would be the ones that could portray Wayne and I in that light if anybody would." Markus: "Did you believe him when he said those things?" Tucker: "No.") (emphasis added).[FN4]

> FN4. Evidently, Tucker's concerns about future government prosecutions was well-founded. Although none of the witnesses who testified for the United States have been prosecuted for doctor shopping, Tucker and McQuarrie were arrested by state law enforcement on April 1, 2009 for their purchase of pain medication. [DE 309 at 8 n. 7].

Importantly, in Tucker's opinion, she felt that, in all her interactions with the defense team, she was never made to feel uncomfortable, her words were not 1300 being twisted, and she was treated very nicely. [Tr. Mar. 16, 73:11–74:1]. To the contrary, Tucker believed the DEA was trying to twist her words and had made her feel uncomfortable. [Tr. Mar. 16, 74:11–74:16].

> I just felt like-like I was really being pulled or trying to have my words twisted into a way I wasn't conveying it or I wasn't meaning for them to be or that really wasn't the truth about how it was. I felt intimidated. I felt uncomfortable and nervous and like I was going to say or do the wrong thing where the defense was telling me just to be honest, just tell the truth and everything will work out fine.

19. Wells' account of this conversation occurred four days after Magistrate Judge McAliley's unfavorable recommendation on the Motion to Suppress. It varied from Tucker's recollection in several key respects. At best, I conclude that Wells heard a garbled and confusing statement by Tucker of her concerns and concluded on his own that those concerns were attributable to the defense team. I find Tucker's testimony at the Sanctions Hearing more credible than Wells' testimony, particularly the testimony that it was Wells who suggested that the defense would try to portray Wayne and Tucker in a bad light at trial. I base my credibility finding on the fact that Wells had "twisted" Tucker's words in the past to fit his view of the case, he was not credible in preparing the Shaygan DEA–6 regarding Shaygan's invocation of right to counsel, and he was found not credible before the Magistrate Judge at the suppression hearing. In my view, Wells was unhappy about the way the case was proceeding. His concern was exacerbated by Tucker's telephone call. Notwithstanding, according to Wells,

> [Tucker] specifically told me that she had spoken to an investigator, did not name him, with the defense

> team and that he had indicated that she was potentially going to be portrayed as a drug dealer or a drug abuser at trial by the Government. In addition, she stated that she was concerned because she felt she had not done anything wrong and the investigator had led her to believe that she could potentially face charges from the Government based on her interaction with Dr. Shaygan in the past and through what she had told us in her previous interview. She further indicated that she was extremely concerned about this because she is the mother of a small child and did not want anything to jeopardize her ability to continue taking care of that small child.

[Tr. Mar. 16, 99:14–100:2].

20. Wells did not ask Tucker who in particular from the defense team she had spoken with. Further, although Wells testified that Tucker told him she had the conversation with the investigator "earlier," Wells did not ask when she spoke with the investigator and assumed it occurred earlier that day. [Tr. Mar. 16, 105:18–106:3]. Wells further did not take notes of this conversation during the time it occurred or immediately after the conversation, and did not document this conversation in a written DEA–6 until December 10, 2008. [Court Ex. 2; Tr. Mar. 16, 100:7–100:8; 100:22–101:3]. As noted below, this DEA–6 was not turned over to the Court even though I entered a specific order that all 1301 DEA–6s be provided for in camera review before commencement of trial. As case agent, Wells was in court when the order was issued. [Tr. Mar. 16,

101:19–22]. At the Sanctions Hearing, Wells acknowledged that he had previously provided Tucker's supplemental DEA–6 to the USAO, specifically to AUSA Karen Gilbert, chief of the Narcotics section. [Tr. Mar. 16, 102:6–20]. I reject that Wells did not understand that Tucker's supplemental DEA–6 was required to be turned over, and that he and AUSA Cronin did not discuss it.

If this DEA–6 was transmitted to the court, I immediately would have provided it to the defense team because of the very serious charge purportedly made by Ms. Tucker, as written by Wells, that "she was advised by the investigator that based on the information she provided to the government regarding her association with Shaygan in an interview on August 15, 2008, federal prosecutors were planning to make her appear as though she is a drug abuser and possibly a drug distributor during the Shaygan trial." [Court Ex. 2] (emphasis added). More importantly, the December 10 Tucker DEA–6 reported that Carlos Vento had recorded his conversation with the defense investigator, Michael Graff. Otherwise stated, if this DEA–6 was turned over to the Court, Vento's digital recording of the defense investigator would have been made known to the Court and, therefore, to the defense prior to trial. This would have lead to the disclosure that Vento was acting as a confidential DEA informant which also was not disclosed to the Court and the defense, as is further discussed below. I find that the failure to turn over Tucker's DEA–6, as written on December 12, 2008, was willful, vexatious and in bad faith.

21. Immediately after Wells ended his call with Tucker, he called AUSA Cronin and conveyed to him the substance of his conversation with Tucker. The conversation lasted almost 30 minutes. [Def. Ex. 2]. No notes were made of the Cronin/Wells conversation. According to Wells, he told Cronin the exact substance of his conversation with Tucker. AUSA Cronin did not instruct Wells to make detailed notes of the Tucker conversation, or to cease his contact with Tucker until further instruction, notwithstanding he well knew that Wells also was functioning as the lead case agent in the case.

22. At the Sanctions Hearing, Wells said he told Cronin that he was concerned that Tucker was "going south" as a witness and may be showing signs of reluctance in cooperating with the government in its prosecution of Dr. Shaygan, and felt it may be necessary for Cronin, as the prosecutor in the case, to assuage Tucker's concerns. At no point did Wells ever state or allude to Cronin that there was potential "witness tampering":

> [Witness tampering] is not something that was in my vocabulary. I don't investigate witness tampering witnesses. I have never been involved in anything like this, so that was not a term that was even in my vocabulary at that point. My concern was we had a witness who called me on a Friday evening on my cell phone and was clearly concerned and my response to that was we needed to settle her down. She seems as though she may be really upset about what could potentially happen to her at trial.

[Tr. Mar. 16, 122:13–122:31].

23. Cronin conceded that Agent Wells did not allude to witness tampering, and that it was his idea during the phone call to explore the possibility of a witness tampering investigation. [Tr. Mar. 16, 126:24–127:2, Tr. Mar. 17, 84:19–84:21]. Wells confirmed in his testimony that it was Cronin who first came up with the term "witness tampering." [Tr. Mar. 16, 122:17–123:11] (Wells: "I did not feel that [witness tampering occurred] at all. In fact, that term had not been mentioned to me until I spoke to Mr. Cronin"). Wells does acknowledge that he told Cronin of his concern that Tucker was "going south" and that he and Cronin discussed whether the defense team was "interfering with the witnesses." [Id.; Tr. Mar. 16, 116:1–4].

24. I conclude that AUSA Cronin acted, at this stage, with implicit bias, and in bad faith, in participating any further in this collateral matter after receiving the phone call from Wells, especially given his past acrimony with the defense team. Accordingly, Cronin was duty-bound to tell Wells to report the contact to his superiors and to not involve himself any further, let alone to set in motion what Cronin (not Wells) characterized as a "witness tampering investigation." The fact that Cronin initiated an earlier "witness tampering" investigation involving a defendant represented by this same defense team is too coincidental to ignore. I also draw a strong inference that, in light of Tucker and McQuarrie's stated position in favor of the defense, and Falcone had yet to be located, Cronin shared Well's concern that his

case as a whole was "going south." The strong inference here is that Cronin was concerned about future contact by the defense team with his two key witnesses, Vento and Clendening. If those two "went south," then so would much of his case, especially the twenty-year enhancement count which hinged on Vento and Clendening's predicate testimony pertinent to Counts 2 through 5 of the Superseding Indictment.

25. Cronin then placed a call to HIDTA Deputy Chief Juan Antonio Gonzalez to discuss the proper course of action based upon the report from Wells. According to Cronin, he told Gonzalez, "it could well be that Ms. Tucker was not relaying the call correctly." [Tr. Mar. 17, 86:19–87:11]. Per his affidavit, Gonzalez told Cronin that if, after confirming with Wells the allegations, Cronin thought the matter should be investigated, Cronin should contact AUSA Karen Gilbert. Contrary to this statement, Cronin, at the Sanctions Hearing, testified that it was Gonzalez's decision to contact AUSA Gilbert. [Tr. Mar. 17, 92:22–93:1] (Cronin: Gonzalez indicated that I should discuss the issue further with Karen Gilbert).

On further questioning from the Court, however, Cronin admitted that it was his "decision to contact Ms. Gilbert." [Tr. Mar. 17, 93:19–94:8] (Court: "But you did make a decision because you decided to contact Ms. Gilbert to pursue this." Cronin: "My decision to contact ... Ms. Gilbert, absolutely."). Despite assertions to the contrary in his written declaration, Cronin admitted that he in fact determined that tape recording the defense team was

an appropriate means to investigate the possibility of witness tampering and contacted Gilbert accordingly.1303 [Tr. Mar. 17, 86:6–86:18]. At that point of time, Cronin had concluded that the investigation also should include the defense attorneys. He later confirmed this aspect of the investigation in instructions to Wells on November 24, 2008.

I find that AUSA Gonzalez acted inappropriately by permitting Cronin to make the decision whether the matter should proceed at all and by instructing Cronin to confirm the allegations with Wells. Gonzalez was obligated to instruct Cronin, as the lead trial attorney, to cease and desist from participating in this collateral matter. Both Cronin and Gonzalez were obligated to follow their own office policy which provided guidance for prosecutors regarding potential investigation of attorneys in order to avoid "a public perception of ... animus toward the attorney." [Court Ex. 5, at 3]. Gonzalez, at that point, should have assumed personal responsibility for investigating, or causing the investigation, of such a serious matter before further contact was made with Gilbert. While I find that Gonzalez failed in his supervising role, I do not credit Cronin's testimony at the Sanctions Hearing that he raised doubts to Gonzalez about the accuracy of Tucker's statements. Nothing in his conduct confirms his testimony. Instead, it was Cronin who labeled Tucker's remarks as "witness tampering" and initiated further contact with his AUSA Karen Gilbert. At no time did he advise Gilbert about his "doubts." I find that there did not exist at this

juncture sufficient facts for the United States to proceed in good faith on a collateral prosecution for witness tampering.

26. On November 24, 2008 (the same date when the Government was to inform defense counsel of the contact information for government witnesses), Cronin and Hoffman placed a call to AUSA Karen Gilbert and portrayed this collateral investigation as involving witness tampering. [Tr. Mar. 17, 7:18–8:2]. All of this was done orally. Gilbert required no written memorandum from Cronin or DEA–6 from Wells. She did not independently call Wells to ascertain any facts or independently interview Tucker. [Tr. Mar. 17, 17: 18–24, 18:13–19:1, 26:4–17]. Rather, she simply listened to Cronin and deferred to his opinion as to proceeding with recording the defense team. [Tr. Mar 17, 18:17–22; Tr. Mar. 17, 86:15–18] (Markus: "Who was the first person who thought of tape recording the defense team ...." Cronin: "... I would assume it would be me."). Gilbert offered no satisfactory explanation at the Sanctions Hearing why one or more of these steps were not taken, although she acknowledged this was her first witness tampering investigation involving a defense investigator and the matter was of significant importance. [Tr. Mar. 17, 12:19–15]. At no time did it occur to Gilbert to bring the matter to the Court's attention ex parte.

27. Gilbert agreed with Cronin that it would be appropriate to ask potential government witnesses to record calls with the defense team, including the defense lawyers. [Tr. Mar. 17, 22:1–12]. Gilbert

established a "wall" and instructed Cronin that she would be the point of contact for the collateral investigation, and that Cronin and Hoffman should take no part in the investigation. Gilbert instructed Wells not to disclose information about the collateral investigation to Cronin or Hoffman. [DE 270–4, ¶¶ 6, 7; Tr. Mar. 17, 27:12–27:20]. But, Gilbert did not advise the DEA that Wells (who she knew was involved in the main case) should no longer be involved in the collateral investigation, and that a "walled off" agent should be assigned because she concluded it was not her place to tell the DEA what to do. [Tr. Mar. 17, 26:18–28:15; DE 270–4, ¶ 9]. At the Sanctions Hearings, Gilbert could not satisfactorily explain why, as head of the narcotics section, she could not legally instruct DEA to "wall off" the agent. This later became self-evident when DEA Special Agent James Brown was assigned on January 7, 2009 to replace Wells on the collateral investigation. In her affidavit, Gilbert concedes that "in retrospect, I should have urged DEA to assign a 'walled off' agent." [DE 270–4, ¶ 9].

28. Prior to the conversation with Gilbert, AUSA Cronin, not Gonzalez, called the Department of Justice Office of Enforcement Operations ("OEO") to consult about proceeding with this investigation. Cronin told Gilbert there were no prohibitions to this course of action, and that the USAO did not need their approval to conduct recordings under these circumstances. Cronin informed Gilbert of this conversation with OEO, and Gilbert accepted this representation and decided that government witnesses expecting calls from the defense should be

authorized to make recordings of the defense team. [DE 270–4, ¶ 9].

29. Of significant importance, Gilbert failed to inform her superiors of this investigation, as required by USAO policy on attorney investigations. [Court Ex. 5]. At the Sanctions Hearing, she testified that "she thought she had." [Tr. Mar. 17, 15:3–4]. Her testimony in this regard only makes the matter worse. If her supervisor had knowledge of these matters but did not follow through, then the failures of judgment at the United States Attorney's Office were only compounded. USAO policy clearly required that Gilbert notify Bob Senior, who would then advise Jeff Sloman, USAO First Assistant, and ultimately Alexander Acosta, the United States Attorney. The purpose of the policy was to provide safeguards on any matter which could negatively reflect on a defense attorney who has become a target or subject of an investigation. [Court Ex. 5 at 1; DE 270–4, ¶ 12, Tr. Mar. 17, 13:1–15:13]. Pursuant to the notification process, senior members of the USAO would have the opportunity to overrule further investigation if they believed such a result is warranted. [Tr. Mar. 17, 14:8–15:2].

30. On November 24, 2008, Cronin, not Gilbert, authorized Wells to have Vento and Clendening record calls with the defense team, even though Cronin was "walled off" from speaking to Wells about the collateral matter. [DE 270–2, ¶ 8]. Cronin told Wells that the United States Attorney's Office would look into the allegations of witness tampering and that he, Wells, was authorized by the United States

Attorney's Office to permit Vento and Clendening to record "any" incoming phone conversation of members of the defense team, including the defense attorneys. [Tr. Mar. 16, 108:24–109:8, 109:21–110:14]. According to Wells, Cronin further stated, that, from that date forward, "there was a taint team [that] was going to be set up and he was to have no further involvement in this aspect of the continued investigation." Id.

31. Cronin never raised Well's continued participation in the collateral matter with Gilbert, even though Wells continued to interact with Cronin on a regular basis as the lead agent in the main case. I conclude that Cronin intentionally desired Wells to participate in the collateral proceedings. Although Cronin claims he did not think about it as a violation of the "taint wall," I do not credit his testimony given that Cronin, who is an extremely bright and sophisticated prosecutor, well-understood the implication and benefits of continuing his regular contact with Wells as lead agent while the collateral investigation was proceeding. As a result of such contact, Cronin and Hoffman later found out that Vento had made a recording, although both deny knowing the substance (see paragraph 34 below).

32. On December 1, 2008, Wells advises Vento to record conversations with the defense team. Wells conceded at the Sanctions Hearing that he "never experienced anything like this before," and that it was definitely unusual." [Tr. Mar. 16, 111:10–13, 112:19–24]. On the same or following day, Clendening was asked to also record conversations.

According to Wells, no DEA–6s were made for either contact.

33. On December 2, 2008, a DEA officer gave Vento a recording device; Clendening was not given one after Clendening informed Wells that he was already equipped to record phone conversations on his land line pursuant to cooperation with state authorities. [Tr. Mar. 16, 129:2–4]. Wells claimed that neither Vento or Clendening were given any instructions to ask for a bribe, but did tell them (the so-called "neutral witnesses") that "some tampering with witnesses was going on ...." [Tr. Mar. 16, 128:7–13]. Contrary to DEA policy, Wells did not have either Vento or Clendening formally established as confidential informants prior to being authorized to record defense team members. [Tr. Mar. 16, 242:5–20] (Court: Wasn't a confidential source agreement required with Mr. Vento before he made those recordings ... [is] that your understanding of the DEA regulations and policies? Brown: That's my understanding); [DE 250–3, ¶ 3]. Wells' failure to obtain confidential agreements, which Cronin and Hoffman would have had to turn over to the defense, raises the disturbing inference that Wells was instructed not to do so. [Tr. Mar. 17, 118:4–7] (Markus: Whether ... confidential informant agreements were entered into, that fact alone you agree with me is Giglio? Cronin: I think, now that I think of it in those terms, yes, it is.")

34. On December 9, 2008, Wells was advised by Vento that he had made a recording of his conversation with defense investigator Michael Graff.

On that same day, Wells contacted Cronin to advise him about the recording. Wells testified that both Cronin and Hoffman knew that Vento had made the recording. [Tr. Mar. 16, 137:7–11]. Wells stated that he did not communicate to Cronin the substance of the recording. In his affidavit, Cronin states "Special Agent Wells may have indicated that it was Carlos Vento who had made the recording, but he did not tell me who had been recorded, nor did he discuss with me what the substance of the recording was." [DE 270–2, ¶ 9]. At the Sanctions Hearing, and as corroborated by Hoffman's affidavit, Cronin conceded that he knew it was Vento who made the recording. [Tr. Mar. 17, 103:11–12].

I find, without doubt, that, as of December 9, 2008, both Cronin and Hoffman knew that Vento had made a recording of a member of the defense team. Cronin also well–knew that a transcript of the recording would be prepared and, in fact, one was prepared and entered as Court Exhibit 1. Cronin also well knew that Wells would prepare a DEA–6 regarding the Vento recording. In fact, Wells prepared the DEA–6 on December 11, 2008 which included reference to both the Tucker conversation and the Vento recording of Graff. See Court's Exhibit 2. This was one of the DEA–6 that was not produced by Cronin as ordered by the Court, and neither Cronin nor Hoffman brought to my attention that Vento had made such a recording before he testified as a witness. I find that the failure to provide this information was knowing and in bad faith. This is especially true given that the defense was requesting before trial the DEA–6s which contained Brady

material. [DE 212 at 6–7] ("Through this pleading, we are respectfully requesting that the DEA–6s of the interviews of government witnesses be disclosed. These reports most likely contain a wealth of Brady/ Giglio ... [T]he defense can think of no reason to withhold these reports ... we respectfully request that the Court review them in camera to determine whether they contain Brady/ Giglio information.").

35. On December 9, 2008, Wells advised Gilbert that Vento had made a recording. Gilbert instructed him not to discuss the substance of the recording with other agents or members of the trial team; however, by that time, Wells had already advised Cronin that a recording had been made. Gilbert confirmed that Cronin and Hoffman called her on December 9 to advise that a recording had been made. [Tr. Mar. 17, 29:3–12]. It did not strike Gilbert as a red flag that Cronin and Hoffman knew that there was a recording, even though she instructed them not to have further involvement in the collateral investigation. Id.

On December 10, 2008, Wells collected the digital recorder from Vento and transported it to Gilbert. The recording device itself had to be collected since it was the device that provided the recording, as compared to a tape. Both Gilbert and Wells listened to the recording at the United States Attorney's Office, although Wells had previously listened to it before arriving at Gilbert's office. On the recording, Graff explained that, as investigator for the defense team, he had been attempting to contact Vento by telephone and wanted to set up a "face-to-face"

meeting with Dr. Shaygan's lawyers as soon as possible. Although not mentioned in Well's affidavit that was filed with the Court, Vento specifically attempts to elicit a bribe from Graff by explaining that he needs money, [Court Ex. 1, at 6–7] ("I'm doing real, real, real, bad with money ... You know what I am saying?"), and requests that he be permitted to speak directly with Dr. Shaygan by telephone. Id. at 11, 12. 1307 Wells conceded at the Sanctions Hearing that Vento may have been attempting to solicit a bribe. [Tr. Mar. 16, 131:11–19]. As it later turns out, when a recording made by Clendening was heard in open court, Clendening appears to have attempted to solicit a bribe as well (see paragraph 36 below).

After listening to the conversation, Wells concluded that Graff had done nothing wrong. [Tr. Mar. 16, 130:5–7]. He felt it was not his place to offer an opinion to Gilbert. But, Gilbert concluded, "although there was no intimidation or any effort to tamper with the witness revealed on this tape, the investigation continued. At that time, I did not make any decisions about the investigation and determined that we should continue to investigate the allegations." [DE 270–4, ¶ 10]. It did not occur to Gilbert at that point to let her superiors listen to the recording or to receive their approval to proceed with the investigation in accordance with office policy. Although Gilbert did not focus on the attempt to elicit a bribe, she admitted she was concerned about Vento's attempt to have Dr. Shaygan contact him directly. [Tr. Mar. 17, 33:12–23]. It did not occur to her, nor did she inquire, that Vento was a "loose cannon" and he should not be authorized to set a

"face-to-face" with the defense attorneys. Nor did she question whether there was a "reasonable suspicion" to proceed further, given that only thing she knew was what Cronin orally told her. Wells never told Gilbert that "witness tampering" was Cronin's, not Well's, idea. [Tr. Mar. 17, 50:8–18]. Gilbert did not ask, nor did Cronin volunteer, that the relationship between the prosecution and the defense was acrimonious, although, at the Sanctions Hearing, she stated it might have affected her decision if she had known about it. [Tr. Mar. 17, 50:19–51:4].

Gilbert did not consider whether the tape recording had to be turned over to the defense before Vento testified. [Tr. Mar. 17, 42:10–15]. She gave no instructions to Cronin or Hoffman regarding Jencks, Brady or the like. Her only instruction was for Wells "to see what happens next in terms of whether the defense investigator reaches out to the same or other witnesses." [Tr. Mar. 17, 37:24–38:2]. In hindsight, she conceded that she should have brought the matter to her superiors to make the decision as to whether the investigation should continue. [Tr. Mar. 17, 36:8–18].

Although Wells did not express any opinion to Gilbert concerning the investigation, Wells was concerned about several "red flags." First, Wells concluded from the tape that Vento was a "loose cannon" and had tried to solicit a bribe and then requested Graff to have Dr. Shaygan call him, all contrary to Wells' instructions. [Tr. Mar. 16, 136:8–18]. Wells did not clearly recollect commenting to Gilbert about these matters. What Wells did remember saying to Gilbert

was that Vento "... was not listening to my instructions." [Tr. Mar. 16, 133:18–21]. Second, Wells' major "red flag" was that, although there was nothing incriminating on the tape, "there was the green light or the go ahead ... to record the defense attorneys." [Tr. Mar. 16, 135:6–12]. Wells was concerned about proceeding with the collateral investigation "because of the fact that there was potential that attorneys were going to be involved in this." [Tr. Mar. 16, 114:6–11].

Because Gilbert was becoming involved in a murder trial, she assigned AUSA Dustin Davis to be the point of contact on the collateral investigation. She briefed him on the recording and gave him contact information. In hindsight, Gilbert acknowledges that, as the Chief of Narcotics, and because of the importance of the matter, she should have requested information about further contacts from Wells at least through January 5, 2009 when Dustin Davis became acting chief. [Tr. Mar. 17, 43:3–44:25].

36. Wells did not give a recording device to Clendening because Clendening advised him that he already had such a device on his home phone. Apparently, Clendening was recording other persons on behalf of State authorities in order to receive a lesser sentence in a serious drug case that was pending against him at the time. On December 21, 2008, Wells received a voice mail from Clendening saying that he attempted to record a conversation with David Markus but that the device came unplugged so only a small portion was recorded. [DE 250–2, ¶ 10]. On December 29th, Wells called

Clendening to confirm the substance of his earlier conversation with Markus. During the conversation, Clendening confirmed that only a small portion of the conversation was recorded, but that Markus wanted to set up a face-to-face meeting. Wells stated that he did not listen to the first recording or report the content of this conversation to either Cronin or Hoffman. [DE 250–2, ¶ 11]. Wells testified that he did not know that Clendening had recorded a second conversation with David Markus prior to the first of the year. As heard in open court on March 10, 2009, during this conversation, Markus attempted to clear the air with Clendening with respect to an earlier conversation, and told Clendening that he did not want him to get the impression he would be paid any money for his time or cooperation, only transportation costs needed for Clendening to meet with the defense team in person. [DE 250–5 at 1] (Markus: "You know, I just wanted to make it clear I want the truth ... I am not paying any money for anything ... I just wanted to make clear because I was thinking about the call and I didn't know when you were saying that you needed money. I just wanted to make sure ... What I will do to help you with this is I will have my investigator pick you up ... or pay for a cab or I can pay for gas money. Those are the only things I can do.")

37. On January 5, 2009, after returning from annual leave, Wells was advised that the collateral investigation had been reassigned to a senior special agent within the DEA group, Special Agent James P. Brown. [DE 250–2, ¶ 12]. According to Brown, he is debriefed by other agents and was told that the

matter involved potential witness tampering. [DE 250–3, ¶ 1]. He also was debriefed by Wells. Wells advised Brown about the Vento recording and the malfunction of the recording attempted by Clendening. [DE 250–3, ¶ 2].

38. On January 9, 2009, Brown attempted to contact Vento and Clendening to establish them as confidential informants. Brown stated, "I made efforts to contact Vento and Clendening and coordinate future efforts with the two witnesses to record future conversations with members of the defense team. This effort could not be undertaken until Vento and Clendening were formally established as DEA confidential informants for the specific purpose of this taint investigation.1309" [DE 250–3, ¶ 3] (emphasis added).

39. On January 15, 2009, Brown spoke with Vento, and on the same or the following day, Brown spoke to Clendening by phone, to coordinate the process of establishing them as confidential informants. [DE 250–3, ¶ 3; Tr. Mar. 16, 250:12–18]. By January 15, Brown knew that both Vento and Clendening would be witnesses at trial. [Tr. Mar. 16, 250:19–22]. With this knowledge, Brown told both Vento and Clendening that he was running the investigation into witness tampering by the defense team. [Tr. Mar. 16, 250:23–251:3]. Although Brown was speaking to Clendening and was attempting to sign him up as a confidential informant, Brown denies that Clendening told him anything about his recording of a second phone conversation with David Markus prior to the end of December. [Tr. Mar. 16,

249:14–250:6]. Brown testified that he was not even aware that Clendening had a recording device, [Tr. Mar. 16, 248:23–249:3], although, in direct contradiction, he stated in his affidavit, "I was advised by DEA Special Agent Christopher Wells "[o]n January 9th, 2009, of the nature of the investigation ... [and that] Clendening had attempted to record a conversation with the defense team, but that the recorder had malfunctioned." [DE 250–3, ¶ 2] (emphasis added). At a minimum, it is difficult to understand why Brown would not ask Clendening if recordings had occurred when he was attempting to establish him as a confidential informant.

40. On January 16, 2009, Vento signed a confidential informant's agreement [Court Ex. 4]. According to Brown's DEA–6, which was prepared on March 3, 2009, Vento, earlier on January 16, 2009, "agreed to actively participate to determine if additional statements or evidence of witness tampering can be realized." [Court Ex. 3]. Vento was instructed by Brown to set up a face-to-face conversation with the defense team and "kind of see what happened." [Tr. Mar. 16, 246:4–10]. This crucial DEA–6 was not turned over to the Court as ordered prior to trial.

41. Cronin discussed the fact of Clendening's testimony in the Shaygan trial with the state prosecutor involved in Clendening's state case at some point prior to Clendening's sentencing and prior to his testimony in this case. Cronin conceded that he may have spoken with Clendening's lawyers as well. [Tr. Mar. 17, 119:10–13, 18–24]. The state court judge also was informed about Clendening's role as a

witness for the government in the Shaygan prosecution. Id. A reasonable inference is that Clendening received some benefit from the state prosecutor and state judge after being advised of his role in the Shaygan trial. Cronin did not bring these facts to the defense's attention. Rather, it was the defense that put the state plea proceedings into evidence during the trial, following Gilbert's disclosure to the Court.

42. On February 9, 2009, Cronin and Hoffman call Brown (in violation of the "taint wall") to make him aware that the trial was to commence on February 17, 2009. [Tr. Mar. 17 251:15–22]. According to Brown, they "wanted to know what was going on" and what "progress" or "success" he had in setting face-to-face meetings between Vento/Clendening and the defense team. ([Tr. Mar. 16, 261:21–262:23]. They told him: "[W]e [have] trial coming up on February 17, 2009"). Id. They specifically asked Brown, "... did you set up face-to-face through these two witnesses (Vento and Clendening) with the defense lawyers or the defense investigators ...." Id.

The significance here is that (a) Cronin and Hoffman were advising Brown that he had eight days to conclude his investigation. [Tr. Mar. 16, 261:6–12]; and (b) Cronin and Hoffman well-knew that Vento and Clendening were operating as confidential (not neutral) witnesses and never disclosed it to the defense or the Court. Brown testified at the Sanctions Hearing that "they were the trial attorneys involved in the case, and I wasn't sure if I was supposed to talk with them or not." [Tr. Mar. 16, 263:21–264:3].

Of grave concern is that Cronin did not include this conversation with Brown in his affidavit that was filed with the Court in anticipation of the Sanctions Hearing. [DE 270–2]. I find it purposeful that even though Cronin knew that Vento made a recording and knew that he was working with Wells, he did not reveal the information to the Court or to the defense even during trial, and, most telling, purposefully steered clear of it in his questioning of Vento on direct examination. [Tr. Mar. 17, 116:12–14]. Further Cronin did not disclose that he knew Clendening, who testified for the Government after Vento, was working with Wells and that he had agreed to make recordings. [Tr. Mar. 17, 116:18–25].

Even after Clendening gratuitously stated on cross-examination that he had recorded Markus, Cronin did not disclose any Brady/ Giglio information to the Court or the defense; nor would such disclosure have been likely if Clendening did not "blurt out" something about a recording. [Tr. Mar. 17, 117:4–11] (Markus: "If he hadn't blurted that out about the recording, nothing regarding Vento or Clendening would have been disclosed to the defense?" Cronin: "I don't believe so, certainly not by way of this case. I don't know obviously if there would have been further work in the collateral investigation that would have led to that being disclosed at some later point, but as far as I know in all likelihood, not."). Of course, by the time of collateral proceedings, Dr. Shaygan could have been serving a twenty or more year sentence.

I find that Cronin and Hoffman were contacting Brown, and urging progress on the face-to-face contacts with the defense lawyers and investigators, for the bad faith purpose of seeking to disqualify the defense lawyers for conflict-of-interest immediately prior to trial. At the Sanctions Hearing, Cronin conceded that he considered the McLain issue as it related to the defense lawyers and that recusal by the defense team would have been necessary.[FN5] [Tr. Mar. 17, 111:24–112:22] (Court: "... wasn't that a concern to you, that right before this trial ... Mr. Markus ... would ... have [had] to recuse himself [because] his client [would not] have [had] confidence in him because of whether he's making decisions for himself versus his client?" Cronin: "Absolutely ... that is why I went ... to AUSA Davis to determine whether or not there was going to 1311 be any conflict issues that needed to be raised.").

> FN5. United States v. McLain, 823 F.2d 1457, 1463–64 (11th Cir.1987).

Cronin's effort to blame AUSA Davis is disconcerting. At a minimum, it is a further indictment of the lack of supervision in the United States Attorney's Office. More likely than not, Cronin simply was trying to get information from Davis about the status of the collateral investigation. This was of "immediate concern" to him. Cronin acknowledged that any such conflict issues would have to be filed "immediately" with the Court. When asked by the Court if that was "tactical" on his part, he answered "No, absolutely not, your Honor." When asked by the Court, "If I find it tactical, then it would be bad faith, wouldn't it," he

replied, "I believe it would, your Honor." [Tr. Mar. 17, 112:11–113:9].

The effect of such a motion to recuse, if granted before trial, would have been catastrophic. Cronin already knew that Dr. Shaygan was having significant psychological problems as a result of strict home detention and electronic monitoring based upon the prior defense motions filed to lift such restrictions. Cronin also well-knew that if Markus and his investigators were recused, new lawyers and investigators would have had to be appointed at a great cost, and the trial would have been continued for an unknown time period—all to the detriment of Dr. Shaygan and, in my view, to force him to plead guilty which he consistently refused to do. I find Cronin's efforts in this regard were tactical and in bad faith.

43. On February 13, 2009, prior to the commencement of trial, Brown contacted AUSA Dustin Davis and told him that, while efforts were made to coordinate meetings with Vento and Clendening and the defense team, no such meetings had occurred. [Tr. Mar. 16, 247:15–24]. Nonetheless, Brown told AUSA Dustin Davis during that phone call that he had signed up Vento as a confidential source and was attempting to sign up Clendening. [Tr. Mar. 16, 247:25–248:3]. Therefore, prior to trial, AUSA Davis, knew, without doubt, that Vento was operating as a confidential informant under a formal agreement. Davis, although functioning as "acting head of the narcotics division," took no steps to ensure that notice of these circumstances were given

to the defense once the Shaygan trial commenced on February 17.

44. On February 14, 2009, Cronin, in response to a court order on February 12, 2009, filed with the Court, along with an accompanying letter "... DEA–6 reports for government, defense and non-testifying witnesses." [Court Ex. 6]. In response to the Court's questioning at the Sanctions Hearing, Cronin stated that he had asked Wells to gather all the DEA–6s. [Tr. Mar. 17, 99:24–100:9]. Cronin testified that he "did not specifically ask Agent Wells for 6s that may have been generated in the witness tampering investigation." [Tr. Mar. 17, 100:10–15]. He stated "It didn't occur to me that there were other 6s that may be out there that I needed Agent Wells to gather for me [and] "in retrospect I should have specifically asked Agent Wells ... or asked AUSA Davis or Gilbert ...." [Tr. Mar. 17, 100:16–101:2]. I do not find Cronin's testimony that "it did not occur to him" that DEA–6s existed for the collateral investigation to be credible.

Although Cronin says that he should have asked AUSA Davis for DEA–6s, he testified that he called Davis to ask: "Is there anything I need to know before this trial starts with respect to the collateral investigation," and Davis indicated that he didn't believe there was anything but he would check with the agent on the case." [Tr. Mar. 17, 102:5–17]. Cronin acknowledged that the office as a whole had the obligation to respond to the Court's order. [Tr. Mar. 17, 124:16–20] (Court: "Doesn't the office itself, together with the agents under the law, have an obligation to be aware of these things and inform the

Court? Cronin: "Absolutely. I completely agree and, Your Honor, we should have done a better job. There is no doubt about that.").

But, I do not find that the issue is just whether the USAO should have done a "better job." Rather, I find what occurred here was "tactical." AUSA Cronin's "attempt at cover" and "finger pointing to Davis" is not credible. First, according to Brown, Davis, on February 13th, was told by Brown that he had signed up Vento as a confidential informant. It is incredible that Davis would not tell this to Cronin in response to the Court's order. Second, Cronin already knew that Vento had made a recording. At the Sanctions Hearing, Cronin said he was not "thinking about" the fact that a DEA–6 would have had to be made of the recording," although he was aware it was "normal procedure" to have a DEA–6 of the recording. [Tr. Mar. 17, 103:23–104:11]. For Cronin to claim, as he did, that "he was not thinking about it" is blatantly inconsistent with the fact that he called Brown before trial to check on the status of the collateral investigation—a fact that was patently omitted from Cronin's own affidavit. Cronin acknowledged that, if this Court knew about the two DEA–6s of Wells and Brown, it would be of "grave concern." [Tr. Mar. 17, 104:18–25]. But, he claims that it never occurred to him to ask Vento, one of his key witnesses, whether he was signed up with a confidential source agreement either before or after the recording—not even after the trial began and the collateral investigation had terminated. [Tr. Mar. 17, 106: 1–15].

45. Following Clendening's statement about recording David Markus on February 19, 2009, Gilbert appeared before the Court on February 23, 2009, to disclose that conversations with both Graff and Markus were recorded by Vento and Clendening. She stated that no one in her office knew about the second Clendening recording until Clendening testified about it in open court. As of the date of her appearance, Gilbert concluded that there was no wrongdoing by the defense team. At the time of her announcement, Gilbert had no more information than when she had met with Wells originally to review the Vento recording. At the Sanctions Hearing, she claimed that she had reached her decision as a matter of timing, namely, that the trial was underway and the investigation was closed. [Tr. Mar. 17, 58:8–15].

I find that the United States did not come forward in good faith to disclose what had transpired until its hand was forced by the statement that slipped out during Clendening's testimony. Even after Clendening revealed the existence of the tape during his testimony, the matter came to light only by "accident." Gilbert testified at the Sanctions Hearing that "[I]t was merely by accident .... We were out at a restaurant Thursday evening talking about work and that's how it came up. It was not a, "Let me notify you as my boss." I happened to be with a group of people, Mr. Cronin and Ms. Hoffman were there and told the story. It was the first I heard of it." [Tr. Mar. 17, 47:18–48:7] (emphasis added).

I find it astounding that Cronin and Hoffman would casually discuss the matter at a restaurant, after Clendening's testimony on that Thursday, and not immediately disclose the matter to the Court once it occurred. Because they did not even officially report the matter to Gilbert, let alone the Court, the strong inference is that they were "bragging" to their colleagues about what they were getting away with. At least Gilbert understood its significance and reported the matter to her superiors. Cronin and Hoffman's failure to disclose to the Court was not the result of inadvertence or mistake, but was knowing and intentional.

Following Gilbert's appearance, I ordered that affidavits be filed under oath by "anybody who has knowledge of this situation." Ultimately, I reserved on the defense motion to dismiss the indictment and permitted the defense to re-cross Vento and Clendening. I also gave the jury a strong instruction that the re-cross was occasioned by the Government's misconduct.

IV. CONCLUSIONS OF LAW

A. Ethical obligations of prosecutors

[1] A prosecutor has a responsibility to strive for fairness and justice in the criminal justice system. U.S. v. Okenfuss, 632 F.2d 483, 486 (5th Cir.1980). This "sworn duty" requires the prosecutor "to assure that the defendant has a fair and impartial trial," and the prosecutor's "interest in a particular case is not necessarily to win, but to do justice." U.S. v. Chapman,

524 F.3d 1073, 1088 (9th Cir.2008) (quoting N. Mariana Islands v. Bowie, 236 F.3d 1083, 1089 (9th Cir.2001)). As expressed in the oft-quoted words of Justice Sutherland in Berger v. United States:

> 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed.

295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (U.S.1935), overruled on other grounds by Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); see also U.S. v. Williams, 504 U.S. 36, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992); U.S. v. Okenfuss, 632 F.2d 483, 486 (5th Cir.1980); U.S. v. Garza, 608 F.2d 659, 663 (5th Cir.1979).

The Eleventh Circuit has expressed similar sentiment:

> A United States district attorney carries a double burden. He owes an obligation to the government, just as any attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that Anglo–American criminal law rests on the foundation: better the guilty escape than the innocent suffer.

United States v. Wilson, 149 F.3d 1298, 1303 (11th Cir.1998) (quoting Dunn v. United States, 307 F.2d 883, 885 (5th Cir.1962) (emphasis added)). A prosecutor is held to these standards in his individual capacity. (See e.g., Thomas v. Tenneco Packaging Co., 293 F.3d 1306, 1327 (11th Cir.2002) ("Independent judgment is an essential ingredient of good lawyering, since attorneys have duties not only to their clients, but also, as officers of the court, to the system of justice as a whole.") (internal quotation omitted)); United States v. Van Nuys, 707 F.Supp. 465, 470–71 (D.Colo.1989) ("It is the duty of a prosecutor, himself, to evaluate the credibility of the witnesses he calls to the stand.").

The various deficiencies in Cronin's conduct constitute unethical behavior not befitting the role of a prosecutor. As an initial matter, Cronin's displeasure

and ill-will toward defense counsel as a result of Defendant's Motion to Suppress, as evidenced by his "seismic shift" comment, led to the filing of a Superseding Indictment that significantly prolonged Shaygan's house arrest and created huge additional costs and expenses to his defense. Such a "threat," regardless of how Cronin now argues it should be interpreted, is inappropriate in the face of a legitimate motion by the defense, one on which the defense ultimately prevailed. Further, the collateral investigation was unfounded, motivated in part by Cronin's personal animus against the defense team and fueled by his deliberate failure to exercise independent and objective judgment regarding the basis for such an investigation. Indeed, although Wells only expressed concerns that Tucker may be "going south" and that she needed to be "settled down," Cronin unilaterally proceeded to explore the possibility of a "witness tampering" investigation. The pursuit of the collateral investigation further evidenced Cronin's central role in attempting to improperly secure incriminating evidence against the defense team to his advantage. See United States v. Sam Goody, 518 F.Supp. 1223, 1225 n. 3 (E.D.N.Y.1981) ("[W]e believe that it was unethical for the government to "wire" an informant and send him to one of the defendants' offices in an attempt to elicit incriminating statements after that defendant's attorney had presented himself to the prosecutor and told him to deal with his client only through him (the attorney)...."). It was Cronin's idea to seek Gilbert's approval to pursue the investigation and to record the defense team, and he and Hoffman breached the "taint wall" to ascertain from Agent Brown if such recordings or subsequent

in-person contacts with the defense team had yielded any evidence of witness tampering.

Such an unfounded investigation is all the more egregious given the severity of prejudice to the defendant, facing a count carrying a minimum sentence of twenty (plus) years, that would have resulted from disclosure to this Court close to the start of trial that the defense team was under investigation by the USAO for witness tampering. The Eleventh Circuit has held that a defendant is deprived of her Sixth Amendment right to competent counsel where her counsel at the time of trial was under investigation by the same United States Attorney's office. United States v. McLain, 823 F.2d 1457, 1463–64 (11th Cir.1987) (overruled on other grounds); see United States v. Novaton, 271 F.3d 968, 1012 (11th Cir.2001) (affirming the validity of McLain). In McLain, defendants were convicted by jury trial for violating the federal RICO statute, extortion and other related crimes. The Court concluded that the defendants did not receive a fair trial. As to one of the defendants, the Court found, among other reasons, that he was deprived of his right to competent counsel because unbeknownst to him (or the court), his counsel at the time of the trial was under investigation for bribery by the same USAO that was prosecuting the defendant. The Court concluded that a conflict-of-interest existed for counsel because "his personal interests or desires will, or there is a reasonable possibility that they will, affect adversely the advice to be given ... to the [client]." Id.

In contrast to McLain, where the defense counsel was under investigation for a crime unrelated to charges against the defendant, here, defense counsel would have been under investigation for crimes that threatened the integrity and fairness of the trial. Were the government to inform the Court at the eve of trial or during the course of the trial that the defense team was under investigation for witness tampering, under the principles of McLain, and as conceded by Cronin, the defense team would be forced to withdraw its representation of Dr. Shaygan. In fact, David Markus made this motion orally as soon as he heard about the investigation. Such a development would have deprived the defendant of a defense team that had become intimately familiar with his defense, causing him severe prejudice.

Finally, Cronin, along with Hoffman, did not intend to bring the existence of the collateral investigation to my attention. As detailed above, Gilbert brought this matter to my attention on February 23, 2009, who had found out by sheer coincidence when socializing with Cronin and Hoffman on the evening of February 19, 2009 that Clendening had mentioned his recording during cross-examination. While the existence of Clendening's second recording was unknown to all involved, Cronin and Hoffman's failure even at this point in time to realize the need for disclosure of the collateral investigation and the cooperative involvement in the investigation by two central witnesses for the prosecution—Vento and Clendening—is an egregious abdication of their ethical obligations. While Gilbert proclaims that the government in good faith brought these matters to my

attention expeditiously after immediate consultations with Messrs. Senior and Sloman, her sentiment does not disguise the fact that Cronin and Hoffman did not believe there was a need for disclosure or otherwise go to anyone to ask for direction on how to proceed. Had Gilbert not met Cronin and Hoffman socially on the evening of February 19, 2009, none of the disclosures before me would have transpired, and the jury may well have reached a different result. In sum, Cronin, as aided by Hoffman, exhibited a pattern of "win-at-all-cost" behavior in the conduct of this investigation that was contrary to their ethical obligations as prosecutors and a breach of their "heavy obligation to the accused."

B. Discovery Violations

In addition to unethical conduct, Cronin, who conceded he was ultimately responsible for all aspects of discovery, see Tr. Mar. 17, 142:8–13, committed violations under Brady, Giglio, and Jencks.

1. Brady

The seminal decision in Brady v. Maryland requires the prosecution to disclose to the defense evidence that is both favorable to the accused and "material either to guilt or to punishment." 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963). The non-disclosed 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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984)). The Eleventh Circuit has consistently held that in order to establish constitutional error in violation of Brady, a defendant must show: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been revealed to the defense, there is a reasonable probability that the outcome of the proceedings would have been different.[FN6] For purpose of the Brady rule governing suppression of evidence, the Government may not just assert ignorance of information another branch of the Government may have. Halliwell v. Strickland, 747 F.2d 607, 609 (11th Cir.1984); Stephens v. Hall, 407 F.3d 1195 (11th Cir.2005) (Brady applies to evidence possessed by the prosecution team, which includes both the investigators and prosecutors).[FN7] Finally, Brady material should be disclosed in time for it to be effectively used by the defense. See United States v. Bailey, 123 F.3d 1381, 1398 (11th Cir.1997).

> FN6. Florida Bar Rule 4–3.8(c) similarly requires a prosecutor in a criminal case to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.

FN7. Fed.R.Crim.P. 16(a)(1) addresses the discovery of documents and tangible objects. Under Rule 16(a)(1)(E), the government must permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, if the requested items (1) are material to the preparation of the defendant's defense; (2) are intended for use by the government as evidence in chief at the trial; or (3) were obtained from or belong to the defendant. Although Rule 16(a)(1)(E) did not codify the holding in Brady, the rule's requirement that the government disclose documents "material to the preparation of the defendant's defense" indicates that the drafters of the rule recognized the government's Brady obligation. United States v. Jordan, 316 F.3d 1215, 1250 n. 74 (11th Cir.2003). As such, Brady requires the prosecutor to turn over to the defense evidence that is favorable to the accused, even though it is not subject to discovery under Rule 16(a), since, eventually, such evidence may "undermine[ ] the confidence in the outcome of the trial." Id.

The Eleventh Circuit has held that DEA–6 reports may constitute Brady materials. See United States v. Khoury, 901 F.2d 948, 969–70 (11th Cir.1990) (remanding to district court the question of whether DEA–6 reports constitute Brady material). Here, certain of the DEA–6 reports that the defense did not

possess and that could not have been obtained by reasonable diligence were withheld in violation of the prosecution's obligations under Brady. First, and most significant, was the non-disclosure to the defense or to the Court of the two DEA–6s discussing Vento's recording of his conversation with Graff (Court Ex. 2) and the establishment of Vento as a confidential informant (Court Ex. 3). The impeachment value of these two reports clearly meets the materiality threshold required by Brady. Vento and Clendening were critical witnesses for the prosecution's theory that Dr. Shaygan, in the course of his illegitimate medical practice, prescribed medication to Brendan Downey that resulted in his death. Cronin's opening statement reflected the importance of Vento and Clendening to his case.

> [Vento and Clendening] will both testify and they will both tell you what happened that day. They will tell you how when they got into the defendant's office, Carlos started questioning the defendant about his ridiculous practices with Brendan, seeing him at a Starbucks where he didn't have even a scale of a blood pressure machine, nothing to even make the pretext of being a doctor rather than a drug dealer.... [Vento was asked] questions about Brendan Downey and right in front of [Vento] ... [Defendant] started filling in more information to Brendan's file, retroactively trying to make it look like he treated Brendan as a doctor rather than selling him scrips as a drug dealer. [Defendant] then pulled out this checkbook and asked Carlos what he wanted. Carlos told him he didn't want to make money off of Brendan's death, but he did want free prescriptions

> for himself, for Trinity Clendening and for his wife, Carey Holmes Vento ... and the defendant readily agreed.... This was a bribe to heave Carlos and Trinity keep their mouths shut about his role in Brendan Downey's death.

[Trial Tr., Feb. 18, 2009, 45:12–46:17]. The prescriptions that Vento and Clendening received from Dr. Shaygan also featured prominently in Cronin's opening statement to show Defendant was nothing but a drug dealer, that he did not conduct physical exams on patients, failed to take back original prescriptions after giving patients a corrected one, wrote prescriptions for one patient but intended for another, and wrote prescriptions for patients who failed drug tests. [Trial Tr., Feb. 18, 2009, 46:18–48:23]. The DEA–6 reports, which indicated that Vento was a "federal cooperating witness" and had successfully made a recording of his conversation with a member of the defense team, and that he ultimately was signed up as a confidential source, would have been a significant factor in a jury's determination of Vento's credibility. These DEA–6s would have further revealed Clendening's role in the collateral investigation. Indeed, the re-cross-examination I permitted of Vento and Clendening, after reserving on Defendant's Motion to Dismiss the indictment, reflected the impeachment value of this information. [Trial Tr., Mar. 10, 2009, 81:9–14] (Markus: "Are those your signatures next to every one of those lines [on the confidential source agreement]?" Vento: "Yes, it is." Markus: "Okay. So you signed that you acknowledged that you could get compensation for your services [as a confidential source], right?" Vento: "Correct."). See also Tr. Mar. 17,

118:21–129:1 (Markus: "Do you believe that the facts of the tape recordings and what Vento and Clendening did in this case aided the defense in getting not guilty verdicts?" Cronin: "It certainly aided the defense. I don't know whether or not your client would have been acquitted but for that, but it certainly was used very well by the defense.).

Further, certain of the DEA–6 reports, including those of interviews with Tucker, McQuarrie, Andrew Gribben, and Enrique Betancourt, include favorable information regarding Dr. Shaygan's activities with respect to government witnesses.[FN8] Markus made repeated requests to the prosecution for DEA–6s of witnesses who had positive things to say about Dr. Shaygan, including the DEA–6 for Courtney Tucker, who from the defense's perspective was a favorable witness to Dr. Shaygan despite being called as a government witness.[FN9] [Tr. Mar. 17 109:1–24]. The DEA–6 reports were material to the guilt of Dr. Shaygan because they spoke to the quality of defendant's medical care and directly related to the prosecution's theory that the defendant was not a legitimate doctor. Therefore, had the revelation of prosecutorial misconduct not arisen to color the verdict of acquittal reached by the jury, there was a reasonable probability that these DEA–6 reports would have made a difference to the outcome of the case.[FN10] Accordingly, the failure to disclose the DEA–6 reports to the defense prior to trial was a violation of the prosecution's disclosure obligations under Brady.

> FN8. For example, as discussed above, the DEA–6 report of the Tucker interview on August

15, 2008 reflected positive statements made by Tucker about the quality of care she received; specifically, that Dr. Shaygan provided "thorough examinations including flexibility exercises," "seemed very interested in her well being," and had prescribed her "antibiotics for a urinary tract infection." The DEA–6 report of the Gribben interview on August 13, 2008 reflected that Gribben filled out a patient questionnaire, that Shaygan reviewed his MRI and pressed on various areas of his back, and that at later visits he was weighed and was administered a urinalysis drug test. The DEA–6 report of Enrique Betancourt reflected that Dr. Shaygan requested Betancourt to provide his medical records, and that Dr. Shaygan performed standard physical procedures. Finally, the DEA–6 report of the interview with Wayne McQuarrie reflected that Dr. Shaygan conducted a thorough medical exam on him to include height, weight, and blood pressure, and that Shaygan refused to prescribe certain medication that he did not need.

FN9. Although the DEA–6s were provided to the Court pursuant to court order, the prosecution's Brady disclosure obligation is to the defense, not the court.

FN10. The government's position that these documents did not constitute Brady material because they were consistent with the government's theory is unavailing, because jurors may well view the information as

inconsistent with the government's case and exculpatory as to Dr. Shaygan.

2. Giglio

The ruling in Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972) has been interpreted by the Eleventh Circuit as "a species of Brady error." Ford v. Hall, 546 F.3d 1326, 1331 (11th Cir.2008). The disclosure requirement of Giglio ensures that " 'the jury knows the facts that might motivate a witness in giving testimony.' " Brown v. Wainwright, 785 F.2d 1457, 1465 (11th Cir.1986) (quoting Smith v. Kemp, 715 F.2d 1459, 1467 (11th Cir.1983)). Accordingly, the prosecution has a duty to disclose evidence of promises made to a witness in exchange for testimony. Ford v. Hall, 546 at 1332 (11th Cir.2008) (citing Giglio, 405 U.S. at 154–55, 92 S.Ct. 763; Tarver v. Hopper, 169 F.3d 710, 716 (11th Cir.1999)). "Even mere 'advice' by a prosecutor concerning the future prosecution of a key government witness may fall into the category of discoverable evidence." Tarver v. Hopper, 169 F.3d 710, 717 (11th Cir.1999) (quoting Haber v. Wainwright, 756 F.2d 1520, 1524 (11th Cir.1985)).

The government concedes that it should have disclosed the fact that Vento and Clendening were cooperating witnesses in the USAO's collateral investigation, and not neutral witnesses as portrayed at trial. [DE 299 at 2]. Cronin was aware as of November 24, 2008 that both Vento and Clendening had agreed to record their conversations with the defense team in aid of the USAO's collateral

investigation. [Tr. Mar. 17, 116:18–25, 117:20–118:3]. This cooperation with the government should have been disclosed in time for the effective use such information by defense. United States v. Saldarriaga, 987 F.2d 1526, 1529 n. 9 (11th Cir.1993) (Giglio requires prosecutors to disclose information regarding a witness' cooperation with the government); see United States v. Russo, 483 F.Supp.2d 301, 308 (S.D.N.Y.2007) (the government is only required to produce Giglio material for impeaching witnesses in time for effective use at trial).

At the Sanctions Hearing, Cronin attempts to make the distinction between a witness who has agreed to make recordings and one who is cooperating with the prosecution. [Tr. Mar. 17, 117:20–24]. It is clear however that, at least as soon as Vento and Clendening were given recording devices, they became aligned with the government. In fact, as DEA Agent Brown testified, Vento and Clendening should have been signed up as formal confidential informants at that point. [Tr. Mar. 16, 242:5–17]. Cronin at minimum should have known that the DEA would attempt to sign up Vento and Clendening as confidential sources or at least verified with them whether they had become confidential informants, a fact that would be potential Giglio material, as conceded by Cronin. [Tr. Mar. 17, 118:4–12]. Further, Cronin had shared the fact of Clendening's testimony in the Shaygan trial with state prosecutors prior to Clendening's sentencing in his state court trial, a fact of which the state judge was also informed. This communication with counsel in Clendening's state court trial falls within the reach of Giglio, despite Cronin's personal belief that the

significant sentence reduction received by Clendening in his state case was due only to Clendening's cooperation with state prosecutors in that case. See [Trial Tr., Mar. 10, 2009, 100:17–101:3] (Markus: "And the reason [Clendening's participation in the Shaygan trial] was explained to the judge to your understanding ... is because your lawyer and the State Attorney wanted to make sure that the judge would not sentence you to three years in prison, correct?" Clendening: "Yes."). Accordingly, the failure to disclose to the defense that Vento and Clendening were cooperating with the government and that Clendening's role in the Shaygan trial was made known to the Judge in Clendening's state court prosecution was a violation of Giglio.

3. Jencks

The Jencks Act, 18 U.S.C. § 3500, provides that "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement ... of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." [FN11] The government has conceded that it violated its discovery obligations under the Jencks Act by failing to disclose Vento's and Clendening's recorded statements to the defense at the time of their trial testimony.[FN12] [DE 299, p. 2]. The recordings related to the subject matter as to which the witness has testified. Vento's recording of his conversation with defense investigator Michael Graff about Brendan Downey and Dr. Shaygan related to his trial testimony, and

Clendening's first conversation with Markus, although cut short by a malfunction of the recording device, also related to his testimony where he discussed the frequency of his visits with Dr. Shaygan.[FN13] Gilbert, an experienced prosecutor who recognized that the collateral investigation was unique and unprecedented, listened to the Vento recording and failed to consider the need for disclosure under Jencks. [Tr. Mar. 17, 44:8–15]. More egregiously, Cronin prior to trial similarly knew that the Vento recording had been made, but made no effort to check with Gilbert or AUSA Davis as to whether the recording constituted Jencks material. [Tr. Mar. 17, 117:4–19; DE 270–2, ¶ 10].

> FN11. The Jencks Act, 18 U.S.C. § 3500 was incorporated into Fed.R.Crim.P. 26.2 in 1979. See also United States v. Jordan, 316 F.3d 1215, 1227 n. 17 (11th Cir.2003).
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> FN12. By the terms of the Jencks Act, the Vento and Clendening recordings constitute a "statement." Section 3500(e) of the Jencks Act defines the term "statement" as "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

FN13. Clendening's second recording, as discussed above, was not known to the prosecution team until Clendening referenced its existence during trial.

C. Sanctions

1. Hyde Amendment

The Hyde Amendment "provides for the award of attorney's fees and [related litigation] costs to a prevailing criminal defendant who establishes that the position the government took in prosecuting him was vexatious, frivolous, or in bad faith." United States v. Gilbert, 198 F.3d 1293, 1296 (11th Cir.1999).[FN14] Because these words are not defined in the statute, they must be given their ordinary meaning. Id. at 1298. "Vexatious means without reasonable or probable cause or excuse. A frivolous action is one that is groundless ... with little prospect of success; often brought to embarrass or annoy the defendant. Finally, bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will." United States v. Adkinson, 247 F.3d 1289, 1291 (11th Cir.2001). The criminal defendant bears the burden of proving this conduct or position by the government by a preponderance of the evidence, as well as establishing that he is otherwise qualified for the award under the law. Id. In sum, "a lot more is required under the Hyde Amendment than a showing that the defendant

prevailed at the pre-trial, trial, or appellate stages of the prosecution. A defendant must show that the government's position underlying the prosecution amounts to prosecutorial misconduct—a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous." Gilbert, 198 F.3d at 1299. The Court in Gilbert further discussed the legislative history and intent of the Hyde Amendment, nothing that it was "targeted at prosecutorial misconduct, not prosecutorial mistake ... [such as] keeping information from [the defendant] that the law says [the government] must disclose, hiding information, not disclosing exculpatory information and suborning perjury...." Id. at 1304 (quoting 143 Cong. Rec. H7786–04, H7791 (Sept. 24, 1997)) (internal quotations omitted).

> FN14. The full text of the Hyde Amendment reads as follows:
>
> > During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations

> (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.
>
> 18 U.S.C. § 3006A.

As I had discussed at the beginning of this Order, and as conceded by the defense, the commencement of this prosecution as to the original indictment was not frivolous or commenced in bad faith. [Tr. Mar. 17, 175:21–176:3]. However, I conclude that the position taken by Cronin in filing the superseding indictment; initiating and pursuing the collateral investigation based on unfounded allegations; suppressing information about the roles of two key government witnesses as cooperating witnesses in the collateral investigation; and attempting to secure evidence from the collateral investigation that would have jeopardized the trial and severely prejudiced the Defendant, constitute bad faith.[FN15] These were

conscious and deliberate wrongs that arose from the prosecutors' moral obliquity and egregious departures from the ethical standards to which prosecutors are held. Gilbert, 198 F.3d at 1299 (noting that bad faith in the law enforcement context is defined to include "reckless disregard for the truth") (citing Franks v. Delaware, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1978)).

> FN15. The term "position of the United States" includes the activities of the "agency" involved and is not limited to the litigating position taken by the Department of Justice. United States v. Gardner, 23 F.Supp.2d 1283 (N.D.Okla.1998).

The Hyde Amendment is applicable to conduct by the government during the course of a prosecution taken in bad faith even if the commencement of the prosecution was commenced legitimately. See Hall v. Cole, 412 U.S. 1, 15, 93 S.Ct. 1943, 1951, 36 L.Ed.2d 702 (1973) (" 'bad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation."); Dictiomatic, Inc. v. U.S. Fidelity & Guar. Co., 127 F.Supp.2d 1239, 1248 (S.D.Fla.1999) ("the bad faith which will warrant an award of fees can be ... bad faith in the conduct of the lawsuit"). Here, the United States concedes to the imposition of attorney's fees and costs for proceedings related to the Motion to Dismiss and Motion for Sanctions despite the fact that the indictment against Dr. Shaygan as originally brought was not frivolous, vexatious, or in bad faith. To the extent that the United States is arguing that the Hyde Amendment would be inapplicable so long as the prosecution was originally brought in good-faith, such

an interpretation would undermine the very purpose of the Hyde Amendment to target prosecutorial misconduct. [FN16] Indeed, courts have held that discovery violations in the course of a prosecution can form a basis for the award of attorney's fees under the Hyde Amendment. United States v. Ranger Electronic Comm., Inc., 22 F.Supp.2d 667 (W.D.Mich.1998); United States v. Troisi, 13 F.Supp.2d 595, 596 (N.D.W.Va.1998) (violation of the duty of a prosecutor to know about and disclose evidence favorable to a person accused may constitute bad faith in context of Hyde Amendment). In Ranger, the court held that the Hyde Amendment was intended specifically to curb abuses associated with the subordination of perjury and the failure to disclose exculpatory evidence, and concluded that the failure by the prosecution to share exculpatory information under Brady, as revealed by documents obtained through the Freedom of Information Act, constituted "bad faith" within the meaning of the Hyde Amendment.[FN17] Id. at 673. While the government conveniently categorizes these acts of bad faith as confined to the collateral investigation, these acts were committed to avoid weakening the government's case-in-chief and for the purpose of severely prejudicing the interests of Dr. Shaygan. Accordingly, I conclude that an award of attorney's fees and costs of Dr. Shaygan incurred after the Superseding Indictment was filed is warranted.

FN16. Courts routinely find bad faith in a party's conduct during the course of litigation. Eagle Hosp. Physicians LLC v. SRG Consulting, Inc., 561 F.3d 1298 (11th Cir.2009) (a party demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order); Kreager v. Solomon & Flanagan, P.A., 775 F.2d 1541, 1543 (11th Cir.1985) (bad faith exception encompasses bad faith acts preceding and during litigation); Woods v. Barnett Bank of Ft. Lauderdale, 765 F.2d 1004, 1014 (11th Cir.1985) (imposition of attorney's fees may be appropriate if an opponent has acted in bad faith, vexatiously, or wantonly as part of the litigation process itself); Rothenberg v. Sec. Mgmt. Co., Inc., 736 F.2d 1470, 1472 (11th Cir.1984) ("In determining the propriety of a bad faith fee award, 'the inquiry will focus primarily on the conduct and motive of a party, rather than on the validity of the case.' ") (internal citations omitted).

FN17. The district court's decision in Ranger was reversed on appeal on other grounds. The Sixth Circuit held that the defendant's Hyde Amendment motion was untimely because it was not filed within thirty days of final judgment as required by the Equal Access to Justice Act, and that time limitation was jurisdictional and cannot be waived. Ranger, 210 F.3d 627, 631 (6th Cir.2000). This holding was overruled by the Supreme Court's recent decision in Scarborough v. Principi, 541 U.S.

> 401, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004), where the Supreme Court held that the EAJA's "30–day deadline for fee applications and its application-content specifications are not properly typed 'jurisdictional.' " Id. at 1865.

Recovery under the Hyde Amendment, however, is subject to the procedures and limitations set forth under the statute and in the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). See United States v. Aisenberg, 358 F.3d 1327, 1339–40 (11th Cir.2004) ("To date, all circuits to consider this issue have concluded that the procedures and limitations in § 2412 incorporated by the Hyde Amendment are the procedures and limitations in § 2412(d)....We now join those circuits."). For example, a criminal defendant must show that: (1) his trial had been in progress during fiscal year 1998 or a subsequent year; (2) his net worth was less than two million dollars; (3) he had been a "prevailing party" in his criminal case, even though subject to possible retrial upon remand; (4) that his legal representation was not the result of court-appointment; and (5) his attorney's fees and costs are "reasonable." Adkinson, 247 F.3d at 1291, n. 2. Dr. Shaygan has filed a declaration [DE 310] attesting that he meets the conditions for recovery of attorney's fees and costs under the Hyde Amendment, including the fact that at the time this case was commenced against him up to the present time, his net worth was less than $ 2 million.

Having determined that an award of attorney's fees and costs is warranted under these circumstances, and further that Dr. Shaygan is eligible for such an award,

I turn to the amount of fees and costs to be awarded. Under the EAJA, attorney fee awards are capped at $125 per hour unless subject to "special factors" justifying a departure from the $125 hourly limitation. 28 U.S.C. § 2412(d)(2) (A)(ii) ("[A]ttorney fees shall not be awarded in excess of $125 per hour unless a court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."); Pollgreen v. Morris, 911 F.2d 527, 538 (11th Cir.1990) (a court's consideration of the increase in the cost of living was a permissible basis to raise the statutory fee rate under the EAJA, but should describe mathematically the basis of all cost of living adjustments).[FN18] I conclude that a cost of living adjustment is appropriate because the $125 cap was established in 1996. Pub.L. 104–121, 1996 HR 3136 (Mar. 29, 1996). Courts in this district have held that the rate of increase in the Consumer Price Index ("CPI") is a proper figure on which to base an enhancement of the hourly rate cap in order to reflect an increase in the cost of living. Brungardt v. Commissioner of Social Sec., 234 Fed.Appx. 889, 890 (11th Cir.2007); Bruland v. Howerton, 742 F.Supp. 629, 636 (S.D.Fla.1990). According to the Bureau of Labor Statistics, the CPI in 1996 was 157, and the CPI in 2008 was 215, reflecting a 37% increase in the cost of living and a corresponding increase of the hourly rate from $125 to $171.[FN19] As this rate is below the prevailing market rate for experienced criminal defense attorneys, the hourly rate awarded is $171. Brungardt, 234 Fed.Appx. at 891 (awarding increased hourly rate based on CPI but not exceeding the fair market rate); Norman v. Housing Auth. of City of

Montgomery, 836 F.2d 1292, 1303 (11th Cir.1988) ("a court is itself an expert on the question of a reasonable hourly rate and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value") (internal quotations omitted). Pursuant to the time records filed under seal by the defense indicating a total of 2884.5 hour worked as of the filing of the Superseding Indictment, attorney fees in the total amount of is $493,764.00. Inclusive of other reasonable litigation expenses, the total award of attorney's fees and costs is $601,795.88.[FN20]

> FN18. The Eleventh Circuit has previously noted that "[m]uch of the EAJA case law defines "special factor" in § 2412(d)(2)(A)(ii) of the EAJA by what it is not. Aisenberg, 358 F.3d at 1343. In Pierce v. Underwood, 487 U.S. 552, 573, 108 S.Ct. 2541, 2554, 101 L.Ed.2d 490 (1988), the Supreme Court stated that special factors in the context of § 2412(d)(2)(A)(ii) do not include "[t]he novelty and difficulty of issues, the undesirability of the case, the work and ability of counsel, and the results obtained," nor "factors applicable to a broad spectrum of litigation" including "the contingent nature of the fee." Id. (internal quotation marks omitted). Similarly, in Pollgreen, the Court noted that special factors in the context of § 2412(d)(2)(A)(ii) do not include "the motivations of the attorneys in bringing the case, the pro bono nature of the case, the fact that the litigation served to 'vindicate public rights,' and

the hardships experienced by counsel in departing from the statutory hourly rate." 911 F.2d at 537 (11th Cir.1990) (citing Jean v. Nelson, 863 F.2d 759, 775–76 (11th Cir.1988)). Further, "[a] delay that occurred because the government litigated a position that lacked substantial justification is not a permissible special factor because any litigation eligible for EAJA fees, by definition, involves the government's pursuit of an unjustified position." Id. at 538. I conclude that there are no special factors here that would warrant an increase in the hourly rate.

FN19. Bureau of Labor's Consumer Price Index for All Urban Consumers, All Items Index, at ftp:// ftp. bls. gov/ pub/ special. requests/ cpi/ cpiai. txtx.

FN20. Defendant further seeks sanctions under 28 U.S.C. § 1927, which provides in pertinent part, that "[a]ny attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." As I do not impose the award of attorney's fees and costs on Cronin or Hoffman personally, sanctions under 28 U.S.C. § 1927 are unwarranted.

2. Inherent Power

Federal courts are vested with inherent power to remedy the misconduct of attorneys and parties practicing before them. U.S. v. Butera, 677 F.2d 1376, 1383 (11th Cir.1982) ("We join ... in the sentiments of our brethren in the Second Circuit that it may be necessary to consider more direct sanctions to deter prosecutorial misconduct ... [w]e encourage the district courts in this circuit to remain vigilant, give appropriate curative instructions when called for, and consider more formal disciplinary action in cases of persistent or flagrant misconduct.") (relying on United States v. Modica, 663 F.2d 1173, 1182–86 (2d Cir.1981)). Available sanctions include "(1) contempt citations; (2) fines; (3) public reprimands; (4) suspension from the court's bar; (5) removal or disqualification from office; and (6) recommendations to bar associations to take disciplinary action." [FN21] Wilson, 149 F.3d at 1304 (citing Bennett L. Gershman, Prosecutorial Misconduct Ch. 13 (1997)); see also United States v. Helmandollar, 852 F.2d 498, 502 (9th Cir.1988) ("We note that a variety of sanctions exist to address acts of prosecutorial misconduct, including: appellate reversal; contempt citations; reprimand in a published opinion that specifically identifies the offending prosecutor or government agents by name; removal from office; discipline by the legal profession; and civil actions for damages.") [FN22]

> FN21. As provided by the Rules Governing Attorney Discipline of this District ("Rules") contained within the Local Rules of this District, discipline for misconduct may consist of (a)

disbarment, (b) suspension, (c) reprimand, (d) monetary sanctions, (e) removal from this Court's roster of attorneys eligible for practice before this Court, or (f) any other sanction the Court may deem appropriate. Rule I.B.

FN22. As attorney's fees are awarded under the Hyde Amendment, I do not rely on the Court's inherent power to award attorney's fees.

In light of the extensive findings of fact above, I conclude that imposition of additional sanctions on the prosecution team and supervisory personnel within the USAO is appropriate. See Wilson, 149 F.3d at 1303–4 ("[W]e want to make clear that improper remarks and conduct in the future, especially if persistent, ought to result in direct sanctions against an offending prosecutor individually....And prosecutors must expect that this court will support district judges who take reasonable steps to correct prosecutorial conduct that is not right."); Modica 663 F.2d at 1185 ("We suspect that the message of a single 30–day suspension from practice would be far clearer than the disapproving remarks in a score of appellate opinions."). Cronin's personal involvement and Hoffman's secondary role in filing the Superseding Indictment; instigating and pursuing the collateral witness tampering investigation; engaging in discovery violations, and creating a potential conflict-of-interest under McLain for the defense team, placed Dr. Shaygan's liberty at unnecessary risk and violated their moral obligation to the accused. The power to sanction Cronin for this misconduct is in no way decreased because Dr. Shaygan was acquitted, as the prosecutor's error is still

error, notwithstanding the result of or prejudice from that error. Cf. Wilson, 149 F.3d at 1303 ("One may think that unless a conviction is reversed, no error has occurred. Such a proposition is incorrect. That we find an error not to be reversible does not transmute that error into a virtue. The error is still an error. And urging the error upon the trial court still violates the United States Attorney's obligation to the court and to the public."). Nor does the availability of an alternate remedy (the re-cross of Vento and Clendening) excuse Cronin's misconduct. See In re Mroz, 65 F.3d 1567, 1575 (11th Cir.1995) (pointing out that "although certain conduct may or may not be violative of Rule 11 or Bankruptcy Rule 9011, it does not necessarily mean that a party will escape sanctions under the court's inherent power"). Therefore, I conclude that under these circumstances, a public reprimand of Cronin and Hoffman is necessary to deter future misconduct.

Likewise, the imposition of sanctions against the USAO and its supervisory personnel within the USAO, particularly Gilbert and to an extent Davis, is warranted. Gilbert was grossly negligent in her treatment of this significant and unique witness tampering investigation against defense counsel during the course of an ongoing criminal prosecution, by failing to properly seek approval for such an investigation pursuant to USAO policy, failing to seek the necessary information about or independently verify the basis for Cronin's belief that a witness tampering investigation was necessary, pursuing the investigation despite no evidence of wrongdoing after she heard the initial recording, and failing to question whether Vento and Clendening should be used as

informants after being told they were not following the instructions of the DEA Agent. Davis, in his capacity as Acting Chief of the Narcotics division, failed to inform Cronin and the Court that a key prosecution witness had been signed up as a confidential source. Such deficient oversight must be remedied to ensure that prosecutors do not act beyond the bounds of ethics in their zeal to secure convictions. Accordingly, it is hereby

ORDERED and ADJUDGED that

1. Defendant's Motion for Sanctions [DE 287] is GRANTED.

2. Attorney's fees and costs in the amount of $601,795.88 are awarded to the Defendant and shall be paid within 30 days of the date of this Order.

3. The USAO is enjoined from engaging in future witness tampering investigation of defense lawyers and team members in any ongoing prosecution before me without first bringing such matters to my attention in an ex parte proceeding.

4. A public reprimand is entered against the United States Attorney's Office and specifically against AUSA Karen Gilbert, Sean Cronin, and Andrea Hoffman.

5. The USAO shall provide within 10 days of the date of this Order the contact information for the relevant disciplinary body of the Bar(s) of which AUSA Cronin and Hoffman are members. Upon receipt of the

information, I will forward a copy of this Order to such disciplinary bodies and request that appropriate disciplinary action be taken.

6. The USAO shall advise the Court in writing as to the outcome of the independent investigation being conducted by the Department of Justice Office of Professional Responsibility.

7. The USAO shall advise the Court within 30 days of the date of this Order as to the procedures that have been instituted to enhance supervision of collateral investigations undertaken by USAO and DEA personnel. Further, the USAO shall similarly report on any enhancements to the USAO's "taint wall" policy and its enforcement.

8. I reserve to impose any further sanctions and/or disciplinary measures as may be necessary against AUSA Cronin and Hoffman after reviewing the results of the Justice Department's investigation.

9. This opinion shall be placed in the public records of the Court and otherwise released for general publication.

676 F.3d 1237, 23 Fla. L. Weekly Fed. C 925
(Cite as: 676 F.3d 1237)

United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America,
Plaintiff–Appellant,
Andrea G. Hoffman, Sean Paul Cronin,
Interested–Parties–Appellants,
v.
Ali SHAYGAN, Defendant–Appellee.

No. 09–12129.

April 10, 2012.

Robert C. Josefsberg, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Anne R. Schultz, Asst. U.S. Atty., Laura Thomas Rivero, Miami, FL, Roberto Martinez, Maureen Elizabeth Lefebvre, Susan Tarbe, Colson Hicks Eidson, Coral Gables, FL, Kirby A. Heller, U.S. Dept. of Justice, Washington, DC, for Appellants.

David O. Markus, David Oscar Markus, PLLC, Miami, FL, for Defendant–Appellee.

G. Richard Strafer, G. Richard Strafer, P.A., Miami, FL, for American Civil Liberties Union of Florida, Amicus Curiae.

H. Scott Fingerhut, Miami, FL, for Nat. Ass'n of Criminal Defense Lawyers, Amicus Curiae

Appeal from the United States District Court for the Southern District of Florida (No. 08–20112–CR–ASG); Alan S. Gold, Judge.

ON PETITION FOR REHEARING EN BANC

Before DUBINA, Chief Judge, and TJOFLAT, EDMONDSON, CARNES, BARKETT, HULL, MARCUS, WILSON, PRYOR and MARTIN, Circuit Judges.[FN*]

BY THE COURT:

The court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure), the Suggestion of Rehearing En Banc and the Petition for Rehearing are DENIED.

PRYOR, Circuit Judge, respecting the denial of rehearing en banc:

I reluctantly write this opinion respecting the denial of rehearing en banc to respond to the dissenting opinion that follows. Judge Henry Friendly once observed that the practice of publishing a dissent about a decision in which the dissenter "did not participate" and "the Court has declined to review ... en banc" is "of dubious policy." United States v. New York, New Haven & Hartford R.R. Co., 276 F.2d 525, 553 (2d Cir.1960) (Friendly, J., concurring in denial of reh'g en banc, joined by Lumbard, C.J.). And Judge Raymond Randolph, who clerked for Judge Friendly, perhaps put

it best: "[D]enials of rehearing en banc are best followed by silence. They should not serve as the occasion for an exchange of advisory opinions, overtures to the Supreme Court, or press releases." Indep. Ins. Agents of Am. v. Clarke, 965 F.2d 1077, 1080 (D.C.Cir.1992) (Randolph, J.). But, alas, "dissents from denial of rehearing en banc are now routine." Indraneel Sur, How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc, 2006 Wis. L.Rev. 1315, 1317; see also Sahyers v. Prugh, Holliday & Karatinos, P.L., 603 F.3d 888, 889 (11th Cir.2010) (Edmondson, J., concurring in denial of reh'g en banc) (questioning "the fashion" of filing "dissents regularly when en banc rehearing is denied").

The original panel opinion speaks for itself, but I write, as the author of that opinion, to set the record straight about a matter that the dissent misunderstands. The Hyde Amendment allows for the extraordinary remedy of invading the public fisc to pay an acquitted criminal defendant's attorney's fees, and this rare waiver of sovereign immunity applies only when a court determines that the entire "position of the United States was vexatious, frivolous, or in bad faith." Pub.L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes). The "position" of the United States is expressed as a singular term for obvious reasons. Congress expected a court to assess the overall prosecution of a defendant and not base an award of fees only on discrete actions that took place during that prosecution. Traditional sanctions exist for discrete wrongs like discovery violations that occur during an otherwise reasonable prosecution, but an award of

attorney's fees under the Hyde Amendment is not one of those sanctions. The Hyde Amendment is concerned with wrongful prosecutions, not wrongs that occur during objectively reasonable prosecutions. The district court erred in when it held otherwise, and the dissent fails to grasp this distinction.

I. BACKGROUND

The panel opinion provides a thorough discussion of the facts underlying this appeal, United States v. Shaygan, 652 F.3d 1297, 1302–10 (11th Cir.2011), but some of those facts, which are unmentioned in the dissent, merit special review. Most notably, the United States began its investigation and prosecution of Ali Shaygan with more than good cause: it all started with a suspicious death.

On June 9, 2007, James Brendan Downey died from an overdose of various drugs including methadone and cocaine. An autopsy revealed that the level of methadone in Downey's blood was alone enough to kill him. Two days before Downey died, Dr. Shaygan had prescribed methadone to Downey.

Downey's girlfriend, Crystal Bartenfelder, testified that she had visited Shaygan's office with Downey on June 7, 2007, and that Shaygan had not conducted any kind of physical examination of Downey. She testified that, during the same visit, Downey asked Shaygan for more oxycodone than he had previously been prescribed. She testified that Shaygan expressed concern that the increased amount of oxycodone would look suspicious, so Shaygan suggested methadone,

which Downey accepted. Bartenfelder was with Downey the night he died, and she testified that he died in his sleep after taking the methadone.

After Downey's death, the Drug Enforcement Administration conducted an undercover investigation of Shaygan. Two local police officers posed as prospective patients to determine how easily they could obtain prescriptions of controlled substances from Shaygan. They recorded their conversations and obtained prescriptions for several controlled substances during their first visits to Shaygan's office. The officers presented no medical records and were given minimal physical examinations during these visits.

On February 8, 2008, the government filed an indictment that charged in 23 counts that Shaygan had distributed and dispensed controlled substances outside the scope of professional practice and not for a legitimate medical purpose in violation of federal law. See 21 U.S.C. § 841(a)(1). When the indictment was filed, the government had not yet identified any of Shaygan's other patients. On February 11, 2008, Administration agents arrested Shaygan and obtained his consent to search his office. The agents seized patient files and Shaygan's day planner. The agents used information from the day planner to identify additional patients of Shaygan, and evidence regarding these patients formed the basis for additional counts contained in a superseding indictment filed on September 26, 2008.

Before trial began, Sean Cronin, one of the two prosecutors on the case, suspected that Shaygan's

defense team might be tampering with potential witnesses. He and his fellow prosecutor, Andrea Hoffman, spoke with their supervisor at United States Attorney's Office, Karen Gilbert, who permitted Drug Enforcement Agent Christopher Wells to ask two potential government witnesses to record calls with the defense team. Gilbert instructed Cronin that she would be responsible for the collateral investigation and that Cronin and Hoffman should take no part in the investigation. Gilbert also instructed Agent Wells not to disclose information about the collateral investigation to Cronin or Hoffman. Agent Wells spoke with the two witnesses, who agreed to record conversations with the defense team. One of the witnesses, Carlos Vento, later signed a confidential informant agreement. Agents filed DEA–6 reports that documented that Vento and the other witness, Trinity Clendening, had recorded conversations with the defense team and that Vento had signed a confidential informant agreement.

At a status conference the week before trial, the district court ordered the government to turn over any DEA–6 reports so that the court could read them before trial to determine if they contained any exculpatory material that should be given to the defense under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Two days later, Cronin filed DEA–6 reports for several witnesses. Cronin had asked Agent Wells for all DEA–6 reports, but Cronin did not ask specifically for those generated in the collateral investigation. The government did not produce the DEA–6 reports related to the collateral investigation.

At trial, the government presented a wealth of evidence to suggest that Shaygan had distributed and dispensed controlled substances outside the scope of professional practice and not for a legitimate medical purpose in violation of federal law. See Shaygan, 652 F.3d at 1305–06. Downey's girlfriend testified that Shaygan, without conducting any physical examination, prescribed Downey the methadone that killed Downey two days later. Id. at 1305. Three of Shaygan's former associates testified that Shaygan routinely wrote them prescriptions for controlled substances without any legitimate medical purpose. Id. The two undercover police officers testified. The government played tape recordings of their conversations with Shaygan for the jury, and the officers explained how Shaygan had provided them prescriptions for controlled substances. Id. Four of Shaygan's former patients gave testimony consistent with the prosecution's theory. Id. at 1305–06. Two other patients gave testimony that did not support the prosecution's theory, but the patients' earlier statements and evidence from their medical files did. Id. at 1306.

During the cross-examination of Clendening, Clendening mentioned a recording he had of a conversation with one of Shaygan's attorneys. The next day, the government explained to the court the recordings and the collateral investigation. The district court allowed the defense to call Vento and Clendening again for cross-examination. The court instructed the jury that the defense did nothing wrong and that "the United States had acted improperly in not turning over the necessary discovery materials and also by allowing

recordings to occur in the first place." Id. at 1307–08.

Shaygan was represented by an elite defense attorney, and Shaygan's superb counsel took advantage of the opportunity to focus the attention of the jury on the alleged misconduct by the government in the collateral investigation. During the new cross-examinations of Vento and Clendening, Shaygan's counsel accused them of not telling the whole truth to the jury because they had not revealed that they had been asked to record conversations with the defense team. In closing argument, Shaygan's counsel compared the alleged misconduct by the government to the Salem witch trials. Shaygan's counsel reminded the jury that the district court had instructed them that the "United States [had] acted improperly," and argued that the jurors had been misled by the government. Shaygan's counsel argued that innocent women had been convicted and hung in the Salem witch trials "because there were no jurors," and he urged the jury to say "no" and to "make sure the Salem, Massachusetts[,] witch trials never happen again." Id. at 1308.

The jury returned a verdict of not guilty on all counts. Immediately after the jury was dismissed, the district court ordered the government to appear on the following Monday. The court stated that it would "hear alternative requests for sanctions," including whether a sanction in the form of attorney's fees and costs should be awarded under the Hyde Amendment. Id. The court at no time stated that it was considering sanctions against the individual prosecutors.

The district court granted Shaygan's motion under the Hyde Amendment and ordered the United States to reimburse Shaygan in the amount of $601,795.88 for attorney's fees and costs from the date of the superseding indictment. The court held that the superseding indictment, though supported by newly discovered evidence, was filed in bad faith because it came after a heated discussion between Cronin and Shaygan's counsel. The court also highlighted the discovery violations related to the collateral investigation and held that "discovery violations in the course of a prosecution can form a basis for the award of attorney's fees under the Hyde Amendment." Id. at 1310. The district court virtually ignored the substantial evidence that supported the charges against Shaygan.

Without providing notice to the prosecutors that they were facing individual sanctions and without even hearing from Hoffman, the district court also entered a public reprimand "against the United States Attorney's Office and specifically against AUSA Karen Gilbert, Sean Cronin, and Andrea Hoffman." Id. The district court ordered the United States Attorney's Office to provide "the contact information for the relevant disciplinary body of the Bar(s) of which AUSA Cronin and Hoffman are members," and stated that it would request that disciplinary action be taken against Cronin and Hoffman. Id. The prosecutors were never given an opportunity to contest the allegations the court made against them.

Although the dissent mentions the "vital and laudatory role," Dissenting Op. at 1245, of prosecutors

and opines that the district judge "performed his assigned role with great care," id. at 1246, the dissent neglects to mention the grievous wrong that the district court committed against the trial prosecutors, Sean Cronin and Andrea Hoffman, in this case. By ignoring this matter, the dissent understandably refrains from defending the inquiry by the district court that led to the public reprimand of these prosecutors without affording them the two rudiments of the fundamental civil right of due process: notice and an opportunity to be heard. About that error, the panel opinion was unanimous. See Shaygan, 652 F.3d at 1318–19, 1326. We vacated the sanctions by the district court and refused to affirm any finding that the trial prosecutors had engaged in any misconduct. Id.

The dissent does not contest our ruling, but instead ignores it altogether. The dissent states that "this Court's opinion in Shaygan does not set aside the findings of fact that undergirded Judge Gold's Hyde Amendment analysis. Indeed, the opinion assumes that the prosecutors did and said everything that Judge Gold found to be true. Neither does it point to error in Judge Gold's findings of fact that the prosecutors acted in violation of their ethical obligations as representatives of our government." Dissenting Op. at 1250. The panel opinion did not need to decide whether the findings of alleged misconduct as they related to the award of fees under the Hyde Amendment were clearly erroneous, as the government argued, because the alleged misconduct, even if true, could not constitute "the position of the United States." But the findings of misconduct, as they were used to support the reprimands of the prosecutors, were

vacated by the unanimous panel as "unreliable because [they] w[ere] developed, after all, without affording either [prosecutor] due process." Shaygan, 652 F.3d at 1319. The panel refused as follows to endorse any findings of misconduct: "It is not apparent to us that either attorney necessarily violated any ethical rule or any constitutional or statutory standard." Id. These public servants deserve better.

II. DISCUSSION

When it awarded Shaygan fees under the Hyde Amendment, the district court erred in two ways. First, as the panel opinion explains more thoroughly, the superseding indictment was not brought in "bad faith" because there was an objectively reasonable basis for bringing it. See Shaygan, 652 F.3d at 1312–15. That is, the government uncovered new evidence of additional unlawful activity when agents discovered Shaygan's day planner. The day planner led the agents to new patients and witnesses, and based on information from these patients, the government filed the superseding indictment. Shaygan never denied that the superseding indictment was supported by new and sufficient evidence. The prosecutors were doing their job, and when "[w]hen public officials do their jobs, it is a good thing." Foy v. Holston, 94 F.3d 1528, 1534 (11th Cir.1996). Second, the district court erred when it held that discovery violations alone can support an award of attorney's fees under the Hyde Amendment. The term "position of the United States" refers broadly to the overall litigating position of the United States, not to isolated instances of misconduct in an otherwise justifiable prosecution. Because the prosecution of

Shaygan was objectively reasonable, the district court did not have discretion to award attorney's fees under the Hyde Amendment.

The panel opinion held that the Hyde Amendment is reserved for a specific kind of wrong. The Amendment applies when the government brings a prosecution that is objectively wrong, not when the prosecutor commits wrongs during a reasonable prosecution. Although the dissent expresses fear that the panel opinion will leave courts without the power to check prosecutorial misconduct, checks on prosecutorial misconduct existed long before the Hyde Amendment and remain in force. For example, as a sanction of prosecutors for discovery violations, a district court can prohibit the government from introducing the undisclosed evidence or "enter any other order that is just under the circumstances." Fed.R.Crim.P. 16(d)(2)(C)–(D). A court also can publically reprimand prosecutors for misconduct, though it must afford them due process, which the district court failed to do here. But a court can grant the extraordinary remedy of an award of attorney's fees only when it establishes that a wrongful prosecution has occurred. No comparable remedy existed before the enactment of the Hyde Amendment. The dissent suggests that "Congress sought to respond to patterns of prosecutorial misconduct" when it used the phrase "the position of the United States," Dissenting Op. at 1251, as if Congress intended the Hyde Amendment to supplant extant remedies for prosecutorial misconduct. But that interpretation makes no sense.

Our interpretation of the Hyde Amendment is

consistent with the decision of the Sixth Circuit in United States v. Heavrin, 330 F.3d 723 (6th Cir.2003). In that case, the district court had awarded a defendant attorney's fees and costs under the Hyde Amendment on the ground that some of the charges against him were frivolous, but the Sixth Circuit reversed. The Sixth Circuit ruled that the district court had erred when it awarded attorney's fees and costs without "assess[ing] the case as an inclusive whole." Id. at 731. The Sixth Circuit reasoned that "[a] count-by-count analysis" was inconsistent with the Hyde Amendment because its plain language refers to the "position" of the United States in the singular. Id. at 730. It concluded that, "[w]hen assessing whether the position of the United States was vexatious, frivolous, or in bad faith, the district court should ... make only one finding, which should be based on the case as an inclusive whole." Id. (internal quotation marks omitted).

The dissent misinterprets the panel opinion and states that it "collapses the Hyde Amendment inquiry into only a single question: were the charges against the defendant baseless?" Dissenting Op. at 1250. But the panel opinion holds that the appropriate inquiry under the Hyde Amendment is as follows: was it reasonable to prosecute this case? Plainly these are different questions.

It is not difficult to imagine a prosecution that begins with objectively reasonable charges and later becomes unreasonable to prosecute. For example, the government could bring a case that was objectively reasonable at the outset and later discover evidence

that proved that a defendant was not guilty. If the government continued to prosecute the case, the litigating position of the United States would be in bad faith. Nothing in the panel opinion contradicts this interpretation.

The dissent states that the Hyde Amendment requires a court to consider "a case as an inclusive whole," Dissenting Op. at 1251, and "not fail to see the forest for the trees," id. at 1251, but the dissent then rests its case on alleged discovery violations related to two witnesses' roles in a collateral investigation. The dissent fails to explain how these alleged wrongs represent the entire "position of the United States." The dissent ignores the wealth of evidence that supported both the initial and superseding indictments of Shaygan, including documentary evidence and testimony from former employees, former patients, and two undercover police officers. The dissent cautions against taking a narrow view of the case, but then makes that very mistake.

The dissent's argument is based heavily on a snippet of legislative history of the Hyde Amendment, but that snippet provides a perfect example of why, "when we consult legislative history, we [must] do so with due regard for its well-known limitations and dangers." Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242, 1247 (11th Cir.2008). The dissent notes that, when Representative Henry Hyde introduced the first version of the Hyde Amendment, he spoke of instances when prosecutors "keep information from [the defendant] that the law says they must disclose," "hide information," and "suborn perjury." Dissenting

Op. at 1251 (quoting 143 Cong. Rec. H7786–04, at H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde)). The dissent reasons that "it seems Congress clearly understood that the presence of probable cause does not, and should not, excuse patterns of gross prosecutorial misconduct." Dissenting Op. at 1251.

The dissent's argument about this legislative history is unavailing for at least two reasons. First, Congressman Hyde's statements were made in support of the first version of the Amendment, which was patterned after the Equal Access to Justice Act. See 143 Cong. Rec. H7786–04, H7791 (Sept. 24, 1997) (statement of Rep. Hyde). In that earlier version, any acquitted defendant would have been able to receive attorney's fees unless the government could establish that its position was "substantially justified." United States v. Gilbert, 198 F.3d 1293, 1300 (11th Cir.1999) (quoting 143 Cong. Rec. H7786–04, H7791 (Sept. 24, 1997) (statement of Rep. Hyde)). "[I]n response to concern that the initial version of the Hyde Amendment swept too broadly, the scope of the provision was curtailed significantly" by replacing the old standard with the current standard. Id. at 1302. Thus, Congressman Hyde's statements were made in support of a more lenient standard that Congress rejected. His statements tell us little about the "daunting obstacle" that Congress ultimately adopted. Id. Second, even if Congressman Hyde's statements were relevant, when taken as a whole, they support the view that the Amendment applies only to wrongful prosecutions, not isolated wrongs during reasonable prosecutions. Congressman Hyde warned against the circumstances where the government "charges you

with a criminal violation, even gets an indictment and proceeds, but they are wrong. They are not just wrong, they are willfully wrong, they are frivolously wrong." 143 Cong. Rec. H7786–04, H7791 (Sept. 24, 1997) (statement of Rep. Hyde). The government might engage in various types of prosecutorial misconduct, "[b]ut they lose the litigation, the criminal suit, and they cannot prove substantial justification. In that circumstance ... you should be entitled to your attorney's fees reimbursed and the costs of litigation.... That, my friends, is justice." Id. (emphasis added). Congressman Hyde's statements referred to instances where an entire prosecution is wrong, not instances where a prosecutor commits only a discovery violation or only dislikes a defendant.

The dissent also argues that "the First Circuit has recognized that, under the Hyde Amendment, an award may properly be based on 'an array of government conduct both before the indictment and during litigation,' " Dissenting Op. at 1251 (quoting United States v. Knott, 256 F.3d 20, 31 (1st Cir.2001)), but the dissent's assertion is misleading to the extent that it suggests that Knott allows an award under the Hyde Amendment whenever a defendant's right to discovery is violated. In the same paragraph quoted by the dissent, the First Circuit stated that it would "consider the conduct of the investigation in order to provide a context in which to assess whether a prosecution was 'vexatious.' " Knott, 256 F.3d at 31 (emphasis added). Again, the proper inquiry encompasses the whole prosecution—the forest, not the trees. The First Circuit concluded in Knott that because "[t]he government had ample reason to

investigate and pursue charges against the defendants ... an award of attorneys' fees under the Hyde Amendment [wa]s clearly not warranted." Id. at 34.

If, as the dissent argues, the Hyde Amendment was meant "to respond to patterns of prosecutorial misconduct," Dissenting Op. at 1251, then Congress's requirement that a defendant be acquitted before an award may be even considered would be unnecessary. If the alleged discovery violations in Shaygan's prosecution were the kinds of wrongs Congress sought to address with the Hyde Amendment, then Shaygan should be entitled to attorney's fees whether the jury found him guilty or not. An award of fees, after all, would be a powerful check on prosecutorial power. But Congress did not open the federal treasury to convicted felons.

The extraordinary remedy provided by the Hyde Amendment applies only when a prosecution, assessed as an inclusive whole, is wrong. The prosecution of Shaygan, triggered by the death of his patient and supported by substantial evidence, was not wrong. The Hyde Amendment does not entitle Shaygan to an award of fees of $601,795.88.

MARTIN, Circuit Judge, dissenting from the denial of rehearing en banc, in which BARKETT, Circuit Judge, joins:

Prosecutors perform a vital and laudatory role for our society. To help them carry out this role, we give them enormous power. This, even to such an extent that they have authority to decide whether our

government will seek to take the life of a given criminal defendant. Our federal prosecutors are taught—and often reminded—that the "interest" of the United States "in a criminal prosecution is not that it shall win a case, but that justice shall be done." Strickler v. Greene, 527 U.S. 263, 281, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999) (quotation marks omitted). My observation is that prosecutors almost always do their job so as to bring honor to the remarkable criminal justice system that is ours. At the same time, our system of government is one of checks and balances, and no public official was intended to have power without end.

In 1997, Congress enacted just such a check on prosecutors in a statute commonly referred to as the Hyde Amendment. The legislation was widely understood to be Congress's response to the prosecution of former Congressman Joseph McDade, who had served seventeen terms in Congress. After a lengthy federal investigation and trial, a jury acquitted Mr. McDade. During the development of that legislation, Congressman Henry Hyde, then Chairman of the House Judiciary Committee, referred to "someone we all know who went through hell, if I may use the term, for many years of being accused and finally prevailed at enormous expense, one he will never get out from under." 143 Cong. Rec. H7786–04, at H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Henry Hyde, Chairman, H. Comm. on Judiciary). In that same discussion, Congressman Hyde described the concerns motivating the law which bears his name:

What if Uncle Sam sues you, charges you with a

> criminal violation, even gets an indictment and proceeds, but they are wrong. They are not just wrong, they are willfully wrong, they are frivolously wrong. They keep information from you that the law says they must disclose. They hide information. They do not disclose exculpatory information to which you are entitled. They suborn perjury.

Id. As it was ultimately passed, the Hyde Amendment permits federal courts to award reasonable attorneys fees to criminal defendants who are acquitted if "the position of the United States was vexatious, frivolous, or in bad faith." Pub.L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes). Thus, we in the judicial branch were given our own role to play in this system of checks and balances to protect against prosecutorial misconduct.

The trial judge in this case performed his assigned role with great care. U.S. District Judge Alan S. Gold's comprehensive fifty-page Order awarding Hyde Amendment attorneys fees to Dr. Ali Shaygan was "crowded with thorough findings of fact" detailing government misconduct that took place in his prosecution. United States v. Shaygan, 652 F.3d 1297, 1321 (11th Cir.2011) (Edmondson, J., concurring in part and dissenting in part). Judge Gold entered his exhaustive Order after (1) shepherding the case through the more than fifteen months between the time when Dr. Shaygan was indicted, until this appeal was filed; (2) presiding over the four-week jury trial of Dr. Shaygan which culminated in the jury acquitting the doctor of all 141 counts in the indictment, after a

mere three hours of deliberation, see United States v. Shaygan, 661 F.Supp.2d 1289, 1291 (S.D.Fla.2009), and (3) presiding over an extensive two-day evidentiary hearing held after the acquittal, on Dr. Shaygan's motion seeking relief under the Hyde Amendment, see id.

This Court's opinion sets aside none of Judge Gold's findings of misconduct by the prosecutors, but relieves the government of all Hyde Amendment sanctions, holding that the attorneys fees were not permitted as a matter of law. Specifically, the opinion holds that so long as a prosecutor has an objective basis for charging a defendant, even patterns of serious prosecutorial misconduct are immune from sanction under the Hyde Amendment. See Shaygan, 652 F.3d at 1317.[FN1] To get to this result, the opinion rewrites the statute by limiting the term "the position of the United States" to mean only the basis for bringing charges. The statute will now be enforced in our Circuit in a way that places precisely the type of prosecutorial misconduct Congressman Hyde highlighted as motivating passage of the Hyde Amendment beyond its scope. This Court's opinion also strips our federal trial judges of a rarely needed, but critical tool for deterring and punishing prosecutorial misconduct. And the prosecutorial misconduct that happened in Dr. Shaygan's case deserved punishment.[FN2]

I.

Dr. Shaygan was a medical doctor practicing in Miami. Prosecutors from the U.S. Attorney's Office in the Southern District of Florida sought, and the Grand

Jury returned, a twenty-three count indictment charging Dr. Shaygan with distributing controlled substances outside the scope of professional practice and not for a legitimate medical purpose, in violation of 21 U.S.C. § 841(a)(1). Shaygan, 661 F.Supp.2d at 1293. The indictment also charged that Dr. Shaygan's improper prescribing practices resulted in the death of one of his patients. Id. Judge Gold found that the bringing of the original indictment was "not frivolous or commenced in bad faith." Id. at 1321. However, the prosecution of Dr. Shaygan ran into problems, and the prosecutors responded with tough tactics that deteriorated into disobeying Court Orders, hiding evidence, and shirking the longstanding obligations imposed upon federal prosecutors by Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and the Jencks Act, 18 U.S.C. § 3500.

Early on in his prosecution, Dr. Shaygan refused to withdraw his ultimately successful motion to suppress certain statements taken from him by investigators in violation of his Miranda rights. The prosecutors responded by taking their case against Dr. Shaygan back to the Grand Jury, to get a Superseding Indictment which added, by my count, 118 counts to the original charges. Shaygan, 661 F.Supp.2d at 1298. This is the path by which the jury was ultimately presented with a 141–count indictment against Dr. Shaygan. As I have said, the jury quickly acquitted him of every count.

Judge Gold's Order tells of how it came to pass that

prosecutors enlisted two of their most important witnesses, Carlos Vento and Trinity Clendening (former patients of Dr. Shaygan), to secretly record conversations with Dr. Shaygan's lawyers and their investigator. The lead prosecutor promoted these surreptitious recordings based on a report he got from his own investigator, an agent of the Drug Enforcement Agency (DEA). The DEA agent reported that a third prosecution witness, another patient named Courtney Tucker, was "going south" and "showing signs of reluctance" about testifying against Dr. Shaygan. Id. at 1301. The DEA agent advised that Ms. Tucker was wary of cooperating with the government in Dr. Shaygan's case, because she feared the government would portray her as a drug addict during her testimony at Dr. Shaygan's trial and might even prosecute her in the future. See id. at 1300. Based on this report, the lead prosecutor concluded that Dr. Shaygan's lawyers were behind Ms. Tucker's reluctance to testify and were engaging in "witness tampering." See id. at 1302. He instituted the secret recordings to investigate. Id.[FN3]

Among the problems with this premise for the surreptitious recording of the defense team is that the defense team never did say these things to Ms. Tucker, and neither did Ms. Tucker ever tell the DEA agent that they had. See id. at 1299. On this point, Judge Gold heard testimony from all involved, and made a finding that Ms. Tucker did not tell the DEA agent that anyone from the defense team had ever warned her that she would be subject to federal prosecution or that the government would attempt to portray her as a drug addict. Id. Judge Gold credited Ms. Tucker's

testimony that the defense team never tried to intimidate her. Id. Indeed, the evidence indicated that it was the government that fabricated Ms. Tucker's purported bad statements about Dr. Shaygan when it included things Ms. Tucker did not say in the DEA–6 report (DEA–6). See id. at 1298.

Once the ball got rolling on this baseless "witness tampering" investigation, the detour from the path to justice veered further. The government identified Mr. Vento and Mr. Clendening to the defense team as merely former Shaygan patients who would serve as neutral witnesses to the facts of the case. In truth, the lead prosecutor directed that Mr. Vento and Mr. Clendening be enlisted to record any conversations they might have with Dr. Shaygan's defense team, see id. at 1304, and Mr. Vento was provided with a recording device for that purpose, id. at 1305. Within a few days, Mr. Vento secretly recorded a conversation with Michael Graff, who was the investigator working for Dr. Shaygan's lawyers. Id. Later, at the government's request, but using his own equipment, Mr. Clendening secretly recorded his conversation with David Markus—one of Dr. Shaygan's lawyers. See id. at 1308. These recordings were kept secret from the defense team and the District Court.

The prosecutors violated direct Orders of the Court. Judge Gold ordered the government to give him all DEA–6s so that he could review them, in camera, before the trial began. See id. at 1300–01. Even so, the prosecutors did not turn over the DEA–6 which reported that Mr. Vento had recorded his conversation with Mr. Graff and also documented the DEA agent's

interview of Ms. Tucker. See id. at 1306. Neither did the government provide any DEA–6 which reported that Mr. Clendening had recorded his conversation with Mr. Markus. See id. at 1310 (noting the prosecutor "did not disclose that he knew Clendening, who testified for the Government after Vento, was working with [the DEA agent] and that he had agreed to make recordings"). Also not produced was the "crucial DEA–6" reflecting that Mr. Vento had entered into a confidential informant agreement with the government on January 16, 2009. Id. at 1309.[FN4] As Judge Gold noted, if these DEA–6 reports had been produced to him as he had ordered, Dr. Shaygan and the Court would have known about the recording of the defense team, and that Mr. Vento and Mr. Clendening were serving as DEA informants, instead of appearing as neutral witnesses. See id. at 1317.

Beyond these violations of the Court's Orders, the prosecutors also violated their duties under Brady, Giglio and the Jencks Act.[FN5] For example, the prosecutors knew of information given by Dr. Shaygan's patients that was favorable to him, but withheld it. See id. at 1317–18. This was important because it went directly to the prosecution's theory that Dr. Shaygan was not a legitimate doctor. See id. at 1318. Giglio was violated, for example, when the prosecution never disclosed to Dr. Shaygan that it had contacted a Florida prosecutor on behalf of Mr. Clendening—who was facing felony drug charges in Florida state court—to communicate that Mr. Clendening had been assisting the federal government in its efforts to prosecute Dr. Shaygan. See id. at 1309. The government violated the Jencks Act, when it

possessed recorded statements of Mr. Vento and Mr. Clendening speaking to members of the Shaygan defense team, but did not turn over those statements in connection with Vento and Clendening's testimony at trial. See id. at 1319–20. All this the government failed to do even in the face of specific defense requests for Brady, Giglio and Jencks material, and a standing Court Order to produce it.

II.

As with the factual inquiry, Judge Gold diligently undertook the responsibility imposed on him by the Hyde Amendment to determine whether this misconduct by the government amounted to a position that was vexatious, frivolous or in bad faith. As I have said, he made findings after hearing oral testimony and receiving written affidavits from all involved. He found generally that the two Shaygan prosecutors "exhibited a pattern of 'win-at-all-cost' behavior ... that was contrary to their ethical obligations as prosecutors and a breach of their 'heavy obligation to the accused.' " Id. at 1315. Judge Gold's finding in this regard was supported by countless evidentiary details which cannot all be restated here. I will only briefly summarize.

Among Judge Gold's specific findings of bad faith was his finding that the lead prosecutor undertook the surreptitious recordings in the so-called witness tampering investigation "for the bad faith purpose of seeking to disqualify the defense lawyers for conflict-of-interest immediately prior to trial." Id. at 1310. Judge Gold found that the lead prosecutor knew

that if key defense lawyers for Dr. Shaygan could be disqualified just before the trial, they would have to step down immediately. See id. at 1311. That "catastrophic" blow, it was hoped, would "force" Dr. Shaygan to plead guilty. Id.

Judge Gold also undertook an extensive discussion of how the lead prosecutor failed to follow either the policies of his U.S. Attorney's Office or the specific instruction given him to remove himself from the investigation he had initiated against opposing counsel. Noting how the strict "taint wall" between the Shaygan prosecution and the investigation of Dr. Shaygan's defense team had been repeatedly breached for "tactical" purposes, id. at 1311, Judge Gold found that the lead prosecutor acted with "implicit bias and in bad faith" in this regard as well. Id. at 1302.

Judge Gold drew a "strong inference[ ]" that the Superseding Indictment adding 118 counts to the twenty-three counts of the original indictment was "significantly motived by ill-will." Id. at 1298. Judge Gold found that the addition of so many charges was designed to compel a guilty plea from Dr. Shaygan by "greatly increas[ing] the time and cost of the trial" and by delaying the trial so as to prolong the "strict conditions of house arrest" which were exacting a heavy psychological toll on Dr. Shaygan. Id.

Finally, Judge Gold found that the prosecution's failure to turn over the DEA–6 documenting that Mr. Vento had recorded the defense team was "knowing and in bad faith." Id. at 1306. He found that the prosecution's failure to turn over the DEA–6 report of

the interview of Ms. Tucker was "willful, vexatious and in bad faith." Id. at 1301. These actions and many others, Judge Gold concluded, were "conscious and deliberate wrongs" arising from "the prosecutors' moral obliquity." Id. at 1321. And far from isolated wrongs, he emphasized, they fit into a "pattern" of desperate conduct designed to save a case that had become weak from getting even weaker. See id. at 1315, 1322. It was this pattern of misconduct that led Judge Gold to conclude sanctions were warranted. See id. at 1321–22.[FN6]

III.

As I have said, this Court's opinion in Shaygan does not set aside the findings of fact that undergirded Judge Gold's Hyde Amendment analysis. Indeed, the opinion assumes that the prosecutors did and said everything that Judge Gold found to be true. See Shaygan, 652 F.3d at 1311, 1315–16. Neither does it point to error in Judge Gold's findings of fact that the prosecutors acted in violation of their ethical obligations as representatives of our government. See id.[FN7] Rather, the opinion assumes that the only factor that reflects the position of the government (other than the narrow exception I have mentioned) is the basis for the charges against the defendant. See id. at 1311–16. This astoundingly narrow reading of the term "the position of the United States" collapses the Hyde Amendment inquiry into only a single question: were the charges against the defendant baseless? See id. at 1311–13. If the answer to that question is no, then "the prosecution is objectively reasonable," and the Hyde Amendment inquiry comes to an abrupt halt. Id. at

1317.

Applying this test, the opinion concludes that solely because probable cause supported the charges in the Superseding Indictment, the prosecution of Dr. Shaygan was "objectively reasonable" and therefore not in bad faith. See id. at 1313, 1315–16. This approach makes all of the prosecutorial misconduct found by Judge Gold irrelevant. And by this route, the opinion reaches the remarkable holding that the District Court had "no discretion to award Shaygan attorney's fees and costs." Id. at 1317 (emphasis added). Yet, this holding contradicts what Congress said when it passed the Hyde Amendment and renders the statute incapable of doing what Congress intended. As a result, and not surprisingly, it marks an unwarranted departure from the decisions of our sister Circuits and from Supreme Court precedent.

In passing the Hyde Amendment Congress sought to respond to patterns of prosecutorial misconduct, including instances where prosecutors "keep information from [the defendant] that the law says they must disclose," "hide information" and "suborn perjury." 143 Cong. Rec. H7786–04, at H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde).[FN8] Thus, it seems Congress clearly understood that the presence of probable cause does not, and should not, excuse patterns of gross prosecutorial misconduct. Indeed, the legislative history expressly reflects that "a grand jury finding of probable cause to support an indictment does not preclude a judge from [awarding attorney's fees]." H.R.Rep. No. 105–405, at 194 (1997) (Conf.Rep.), reprinted in 1997 U.S.C.C.A.N. 2941, 3045 (emphasis

added).

To ensure that the basis for the charges alone does not limit the availability of sanctions, Congress adopted the term "the position of the United States" from the Equal Access to Justice Act (EAJA). See United States v. Gilbert, 198 F.3d 1293, 1300 (11th Cir.1999) (noting that Congressman Hyde "patterned his amendment after" the EAJA). The EAJA provides for attorneys fees to litigants who prevail against the United States in civil cases where the government's position is not "substantially justified." See 28 U.S.C. § 2412(d)(1)(A). By the time Congress was considering Congressman Hyde's proposal, and in the context of awarding attorneys fees against the government, the term "the position of the United States" had acquired a specific meaning. In Commissioner, INS v. Jean, 496 U.S. 154, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990), the Supreme Court held that the term requires a court to consider "a case as an inclusive whole." Id. at 161–62, 110 S.Ct. at 2320.

Based on this expansive interpretation of the term "position," the First Circuit has recognized that, under the Hyde Amendment, an award may properly be based on "an array of government conduct both before the indictment and during litigation." United States v. Knott, 256 F.3d 20, 31 (1st Cir.2001). In the same way, the Sixth Circuit has observed that under the Hyde Amendment, "[w]hen assessing whether the position of the United States was vexatious, frivolous, or in bad faith, the district court should [evaluate] the case as an inclusive whole." United States v. Heavrin, 330 F.3d 723, 730 (6th Cir.2003) (quotation marks omitted).

Rejecting the idea that the Hyde Amendment contemplates "a precise litmus test," the Sixth Circuit cautioned that courts "must not fail to see the forest for the trees." Id.

Decisions from other Circuits also reflect that the term "position" requires a court to examine "a case as an inclusive whole," Jean, 496 U.S. at 161–62, 110 S.Ct. at 2320. See, e.g., United States v. Porchay, 533 F.3d 704, 707–08, 711 (8th Cir.2008) (examining whether government conduct following the dismissal of the indictment was in bad faith); United States v. Manchester Farming P'ship, 315 F.3d 1176, 1185–86 & n. 25 (9th Cir.2003) (examining whether government conduct both after the indictment was filed and during trial demonstrated bad faith).

This Circuit stands alone in its now established rule that in order to discern "the position of the United States," a court need only examine the basis for the charges. See Shaygan, 652 F.3d at 1312–16. I find great irony in that, under our rule, the type of misconduct Congressman Hyde specifically decried in urging his colleagues to adopt his amendment is now beyond the scope of the law. This new and myopic view of what constitutes "the position of the United States" under the Hyde Amendment leads to a particularly shocking result in this case. For me this is most plainly manifested in the Court's conclusion that these prosecutors' pattern of conduct—only part of which I have described here—was "objectively reasonable." Id. at 1317. I have no doubt this pattern of wrongs, undertaken to save a failing case, amounted to "the position of the United States."

IV.

In closing, I must say that I realize there are few less popular classes of people for whom to advocate than those charged with federal crimes. One might say that a person, like Dr. Shaygan, who has been acquitted has nothing to complain about. But Congress thought differently. The rules that govern our criminal justice system have developed over the life of our country to allow those accused of crimes to know the evidence against them; to be advised of the weaknesses in that evidence; and to be able to confront the witnesses against them with full knowledge of information which might color their testimony. Just like the rest of us, Dr. Shaygan was constitutionally entitled to all of this as he faced the serious charges leveled against him. The government violated Dr. Shaygan's rights, and now, contrary to what Congress has provided, he is left alone to pay the costs he suffered at the hands of these rule breakers.

It also strikes me as dangerous to render trial judges mere spectators of extreme government misconduct. By enacting the Hyde Amendment, Congress gave trial judges the responsibility to determine whether "the position of the United States was vexatious, frivolous, or in bad faith." I say Judge Gold performed that unpleasant duty admirably, and he had every reason in law to expect that his Order would be affirmed. Indeed, this Court has said "prosecutors must expect that this court will support district judges who take reasonable steps to correct prosecutorial conduct that is not right." United States

v. Wilson, 149 F.3d 1298, 1304 (11th Cir.1998). This Court's decision not to reconsider this case en banc forsakes that principle. I respectfully dissent.

FN* Judge Adalberto Jordan did not participate in the en banc poll.

FN1. The opinion does devise a single exception to this rule. Where a prosecutor uses a constitutionally impermissible factor—such as race or religion—in deciding to bring charges, the opinion permits Hyde Amendment sanctions even if the charges are supported by probable cause. See Shaygan, 652 F.3d at 1312–13. I find the basis for this lone exception nowhere in either the text of the Hyde Amendment or the statute's legislative history.

FN2. I do not contest the panel's decision to vacate the public reprimands against the prosecutors on due process grounds. What I object to is the majority's Hyde Amendment analysis.

FN3. This was not the first allegation of witness tampering made by these very prosecutors related to Dr. Shaygan's defense team. These same two prosecutors earlier brought a case against Evelio Cervantes Conde, which resulted in Mr. Conde being acquitted. See United States v. Conde, No. 07–cr–20973 (S.D.Fla. July 18, 2008) (entering judgment of acquittal). Mr. Conde was represented by Mark Seitles, who later became one of Dr. Shaygan's lawyers. After

the Conde acquittal, the two prosecutors filed a criminal complaint against Mr. Conde, charging him with witness tampering. Shaygan, 661 F.Supp.2d at 1293. Mr. Seitles contested the charge with supervisors in the U.S. Attorney's Office, and the witness tampering case against Mr. Conde was dropped without an indictment. Id.

FN4. Dr. Shaygan's trial began on February 17, 2009. The fact of Mr. Vento's January 16, 2009 confidential informant agreement with the government was not written in the form of a DEA–6 until March 3, 2009, which was during the trial, and after the defense had already learned about Mr. Vento's recording of Mr. Graff. See Shaygan, 661 F.Supp.2d at 1309.

FN5. Judge Gold's fifty-page Order makes so many findings that it is not practical to set them all out here. Beyond what is set out in the main text of this dissent, Judge Gold delineated his findings of (1) instances in which the prosecutors offered live testimony which varied from their own written affidavits previously given to the Court, see Shaygan, 661 F.Supp.2d at 1302, 1306; (2) instances in which various members of the U.S. Attorney's Office and law enforcement agents gave differing accounts of the same events, see id. at 1302; (3) policies of the U.S. Attorney's Office regarding investigations of opposing counsel being violated, see id. at 1303–04; and (4) members of the U.S. Attorney's Office "casually" discussing

with a group of people at dinner, the fact that while he was testifying during Dr. Shaygan's trial, Mr. Clendening blurted out that he had recorded his conversation with Dr. Shaygan's lawyer, when no member of the prosecution had ever disclosed the existence of these recordings to the Court, see id. at 1312–13.

FN6. This Court's Shaygan opinion implies that the District Court rested the award on "discovery violations alone." 652 F.3d at 1315. That is a plainly incorrect characterization of Judge Gold's Hyde Amendment analysis. Judge Gold found that the sum total of the prosecutors' conduct supported the award.

FN7. Judge Pryor says in his concurrence that Judge Gold's findings of misconduct "were vacated by the unanimous panel." Concurring Op. at 1242. However, I do not read the panel opinion this way. The only thing that the majority opinion did was to question in passing the reliability of the record after vacating the public reprimands on due process grounds. See Shaygan, 652 F.3d at 1319.

FN8. Remarkably, Judge Pryor's concurrence to the denial of en banc review says that Congressman Hyde's statements are irrelevant as to what his own proposal means. See Concurring Op. at 1243-44. Judge Pryor emphasizes that Congressman Hyde's statements were made in support of an earlier version of the Amendment. Id. at 1244. But,

while Congress made several changes to the statutory text between the first and final versions of the Hyde Amendment, none had anything to do with the meaning of the term "the position of the United States," which remained unchanged throughout the legislative process. See United States v. Gilbert, 198 F.3d 1293, 1299–1302 (11th Cir.1999).