UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-20112-CR-GOLD/McALILEY

UNITED STATES OF AMERICA :
:
vs. :
:
ALI SHAYGAN :

_____

DEFENDANT ALI SHAYGAN'S MOTION TO DISMISS INDICTMENT FOR GOVERNMENT MISCONDUCT OR TO HAVE AN EVIDENTIARY HEARING

Defendant ALI SHAYGAN, through counsel, and pursuant to the Due Process Clause of the Fifth Amendment, the Counsel clause of the Sixth Amendment, the attorney-client and work-product privileges, the Jencks Act, and the Court's inherent power, respectfully moves this Court to dismiss the Indictment with prejudice for government misconduct or in the alternative, to conduct an evidentiary hearing to determine the extent of and the prejudice resulting from the government's misconduct.

Dr. Shaygan respectfully submits that the government's conduct in this case is so outrageous and was undertaken with such flagrant disregard for Mr. Shaygan's constitutional rights that dismissal is the appropriate remedy under applicable precedent. Because the government deliberately concealed its unauthorized acts, the misconduct was not revealed until trial was well under way. As a result of the concealment of the truth, lesser relief as this Court might order—including the granting of a mistrial, the disqualification of government counsel and the case agent, and instructions to the jury—will not suffice.

In support of this motion, Dr. Shaygan states as follows:

I. INTRODUCTION

This motion seeks relief for a pattern of flagrant government misconduct, which has raised the specter of retaliation against defense counsel, created an unnerving atmosphere of intimidation in the courtroom, and undermined the integrity of the adversarial process. The evidence at trial and in the affidavits of DEA Agents Christopher Wells and James Brown (attached as Exhibits A and B, respectively) has revealed that one or more members of the prosecution team:

1) purposefully invaded the defense camp by inducing two prospective witnesses, Carlos Vento and Trinity Clendening, to surreptitiously record their communications with members of the defense team (including lead defense counsel David Markus and investigator Michael Graff), without a good faith basis and for no legitimate law enforcement purpose;

2) intentionally and surreptitiously acquired knowledge of defense strategy by listening to the recorded conversation of a defense interview—specifically the interview of Vento by investigator Graff on or about December 9, 2008;

3) falsely, or at a minimum misleadingly, claimed to the Court that the reason for the secret recordings was to investigate a complaint by government witness Courtney Tucker of "witness tampering" by the defense—when in fact Ms. Tucker's words were exaggerated and distorted if not completely invented;

4) failed to disclose to the defense (or to the jury) that witnesses Vento and Clendening were confidential informants, thereby depriving the defense of the opportunity to impeach their credibility by confronting them about their bias in favor of the government and motive to shade their testimony;

5) remained silent while one of the witnesses, Clendening, testified to the jury that he taped attorney Markus;

6) failed to produce the recorded witness statements to the defense immediately after direct examination for use during cross-examination, as required by the Jencks Act, 18 U.S.C. § 3500; and

7) attempted to manipulate the trial testimony of Courtney Tucker, a government witness, by twisting her words during pretrial interviews.

II. FACTUAL BACKGROUND

A. Seeds of Discord: A Prior Encounter

The government's conduct in this case can best be understood against the backdrop of history, which appears to have repeated itself. In 2008, co-counsel Marc Seitles represented defendant Evelio Conde in *United States v. Conde*, No. 07-20973-CR-ALTONAGA. Although the *Conde* case was unrelated to Dr. Shaygan's, the prosecutors in the *Conde* case were the same two prosecutors as in this case. After a particularly acrimonious trial, Mr. Conde was acquitted of all counts. Within hours, these two prosecutors filed a complaint alleging that Mr. Conde engaged in witness tampering. *See United States v. Conde*, No. 08-2961-M-WCT. These claims were frivolous and, after a meeting with senior members of the United States Attorney's Office, the case was dropped without an indictment.

B. A "Seismic Shift in the Prosecution"—The Motion to Suppress

On the heels of the *Conde* case, relations between the prosecutors and the defense team were palpably strained in this case. In discovery, the government produced a report prepared by DEA Agent Wells of his post-arrest interview with Dr. Shaygan. The report omitted the fact that Dr. Shaygan had invoked his right to counsel prior to the interview. The defense team told AUSA Cronin about the omission, but AUSA Cronin claimed that Dr.

Shaygan had simply asked Agent Wells whether he needed a lawyer but did not invoke. When lead defense counsel David Markus indicated that he intended to file a motion to suppress, AUSA Cronin responded, in the presence of multiple witnesses, that there would be "a seismic shift in the prosecution" if such a motion were filed, that "his agent" Chris Wells did not lie, that Wells's credibility should not be questioned, and that there would be consequences if the defense filed a motion.

After that discussion, Dr. Shaygan passed a polygraph exam on the question of whether he invoked his right to counsel. Thereafter, the defense filed the motion to suppress, asserting a violation of Dr. Shaygan's Fifth Amendment rights. (Doc. #68). On August 26, 2008, a hearing was held on the motion to suppress, at which Agent Wells and other witnesses testified. (Doc. #113).

As threatened, the prosecution seismically shifted. The government superseded the Indictment on September 26, 2008, to add more than 100 counts. (Doc. #124). On November 17, 2008, Magistrate Judge Chris McAliley recommended that Dr. Shaygan's motion to suppress be granted, finding that the recollection of a 19-year old patient of Dr. Shaygan's that Dr. Shaygan had invoked his right to counsel was more reliable than the recollection of Agent Wells. (Doc. #150 at 16). This Court affirmed the Report and Recommendation. (Doc. #192).

C. Attempted Deception of the Defense—The *Brady* Motion

The defense also filed a motion for *Brady* material. (Doc. #68). Although the details

of that motion are not material, Magistrate Judge McAliley found that a request by the government in its sealed response to the defense motion would have "require[d] this Court to engage in deception" of the defense team. (Doc. #103 at p.3). Not surprisingly, Magistrate Judge McAliley rejected the government's request to engage in deception. (Doc. #103 at pp.3–4).

D. Actual Deception of Senior Supervisory Prosecutors

After these events, the defense voiced concern to senior members of the United States Attorney's Office that the obvious personal tension between members of the prosecution team and defense counsel was affecting the prosecution team's judgment. On February 12, 2009, the defense received an email from a senior member of the United States Attorney's Office with assurances that he had spoken with the prosecutors and that there was no personal animus directed at defense counsel. Yet, at the time those assurances were made, senior members of the United States Attorney's Office were unaware that the prosecution team already had sought and obtained authorization from AUSA Karen Gilbert to secretly record members of the defense team without following procedures required by Department of Justice policy. That is, the prosecution team assured the senior prosecutors that there was no personal animosity for the defense while they concealed from those senior prosecutors that they had orchestrated an invasion of the defense camp without cause or reason.

E. The Malicious Invasion of the Defense Camp

In late November 2008, unbeknownst to any senior member of the United States

Attorney's Office, any official at the Department of Justice in Washington, or any judge, the prosecution team enlisted two fact witnesses to tape record the prosecution's adversaries on the defense team. This did not come to light until three months later, when the trial was well underway. Although the case agent and AUSA Cronin knew that Carlos Vento had taped defense investigator Graff, they did not reveal Vento's status as a cooperating witness and informant before Vento testified. No mention of the recordings or his work for the prosecution team came to light during his testimony.

The first mention of a recording came from witness Trinity Clendening, when Markus cross-examined him on February 19, 2009:

> Q. What happened, Mr. Clendening, isn't this the truth, that you said I needed to pay you for your testimony? That's what you told me on the telephone?
>
> A. No. I got it on a recording at my house.

Attorney Markus assumed at the time that either the claim was false or that Clendening had acted on his own because the government had not disclosed anything about this in pre-trial discovery—as of course it was obligated to do. Even then, the prosecution team still did not reveal to the defense that recordings had been made even though Agent Wells and AUSA Cronin were in the courtroom and heard this exchange.

It was not until the following week, on February 23, 2009, that AUSA Karen Gilbert told attorney Markus during a trial break that he and his investigator had been recorded. Thereafter, this Court ordered the government to prepare affidavits under oath as to what occurred. The affidavits of DEA Special Agents Chris Wells (attached as Exhibit A) and

James Brown (attached as Exhibit B) describe the deceitful infringement of Dr. Shaygan's rights.

According to these affidavits, based on a conversation with AUSA Cronin, AUSA Gilbert gave the okay for the prosecution team to have witnesses record conversations with Dr. Shaygan's defense team to investigate purported allegations by government witness Courtney Tucker that a defense investigator had engaged in witness tampering. Exhibit A at ¶¶ 1, 12–13; Exhibit B at ¶¶ 1–2. Specifically, according to Agent Wells, the defense investigator purportedly warned Tucker that the information she was providing to law enforcement could expose her to federal charges. Exhibit A at ¶ 1. According to Agent Wells, Tucker first made this allegation on Friday, November 21, 2008, Exhibit A at ¶ 1, which, coincidentally or not, was four days after Judge McAliley issued her Report and Recommendation finding Agent Wells' testimony at the suppression hearing less reliable than the defense witness' testimony.

The veracity of Agent Wells' statement as to the basis for the commencing an investigation is demonstrably false. Investigator Graff's detailed notes reveal that neither he nor anyone in his office had any contact with Ms. Tucker after October 23, 2008. In addition, every report by Graff and his team make clear that Ms. Tucker was a helpful witness for the defense and that communications with her were positive and friendly.

Moreover, during her trial testimony on February 26, 2009, Courtney Tucker denied that she complained to the DEA about the defense team. Trial Transcript 2/26/09 at p.84. In

fact, Tucker testified that it was Agent Wells who was not interested in the truth and was twisting her words during pretrial interviews. *Id.* at 82–85. Ms. Tucker explained her contact with DEA this way: "I went into a meeting with the agents and one of the very first thing that was said was, 'You know, we already know the answers to all the questions we are about to ask you. We just need for you to say what those answers are.' I felt like they were looking for a particular answer for something and if I wasn't giving that particular answer, which really was to speak negatively, then it was rephrased to where a negative spin could be put on it." Asked if she felt DEA was "interested in the truth," Ms. Tucker responded, "no." *Id.* at 83.

Agent Wells communicated this purported claim of witness tampering to AUSA Cronin. According to Agent Wells, AUSA Cronin then advised him that the United States Attorney's Office authorized the DEA to tape record communications between witnesses and "the defense team." Exhibit A at ¶¶ 2–3. AUSA Karen Gilbert was to be the "point of contact." Exhibit A at ¶ 3. The request to record the defense team was never communicated to the higher-ups at the United States Attorney's Office, in violation of Department of Justice policy. AUSA Gilbert lacked the authority to approve the extraordinary measure of invading the defense camp, recording the work product of their adversaries, and converting independent witnesses into government agents during the pendency of a criminal case. The government has admitted to violating its own procedures and failing to obtain the necessary approvals in making recordings of the defense team.

Agent Wells fails to explain why he did not ask Courtney Tucker, the purported complainant, to record conversations with the defense team. Rather, Agent Wells recruited government witnesses Carlos Vento and Trinity Clendening—neither of whom had complained about witness tampering or had any relationship with Courtney Tucker—"to record any future conversations with members of the defense team." Exhibit A at ¶ 4. Although the Tucker's purported complaint concerned only one defense investigator, Agent Wells enlisted two unrelated witnesses to record conversations with ***any and all*** members of the defense team—including defense lawyers. It was the government's purpose to secretly use Vento and Clendening as confidential informants in trial preparation meetings with the defense team.

As a result, at least three recordings were made. One recording was by Vento of a conversation he had with defense investigator Michael Graff on December 9, 2008. The second recording, which partially malfunctioned, was by Clendening of a conversation he had with lead attorney Markus on or about December 21, 2008. The third recording was by Clendening of another conversation with attorney Markus, apparently also in late December 2008. Exhibit A at ¶ 5; Exhibit B at ¶¶ 9–10.

Agent Wells claims that he physically obtained and listened to a copy of the recorded conversation between Vento and investigator Graff on December 10, 2008. Exhibit A at ¶¶ 8–9. Agent Wells claims he informed AUSA Cronin that Vento had made a recording, but that he did not identify to AUSA Cronin the party who had been recorded. Exhibit A at ¶6.

The conversation between witness Vento and investigator Graff was approximately 28 minutes long and it revealed defense strategy. The recording provided Agent Wells an insight into the questions the defense deemed relevant to the case. Vento's evident aim in the conversation was to induce investigator Graff to bribe him on the recording, but Graff acted professionally and ethically throughout. Although Agent Wells claims that procedures were implemented to shield "the trial team" from hearing that recorded conversation, Agent Wells and AUSA Gilbert apparently did not appreciate that Agent Wells was himself a member of "the trial team."

Agent Wells claims that he learned about Clendening's first recorded conversation with lead attorney Markus on or about December 21, 2008, but did not bother to obtain a copy because of the "recording malfunction and the indicated lack of content." Exhibit A at ¶ 11. Agent Wells claims that he first learned about Clendening's second recorded conversation with attorney Markus on February 19, 2009. Exhibit A at ¶ 13. Agent Brown claims that the DEA first retrieved both recordings from Clendening on February 21, 2009, and listened to them on that date.[1] Exhibit B at ¶¶ 8–10. The first conversation with attorney Markus lasted approximately two minutes. The second conversation lasted approximately four minutes. Although Clendening claimed not to know when the recordings were made, Exhibit B at ¶ 8, it appears from the contents that they were made in late December 2008.

[1] This Court observed that it "sounds a little unbelievable" that the government authorized Clendening, a government witness, to record the defense team yet did not follow up for two months since December 2008 to obtain copies of the recordings. Trial Transcript 2/23/09 at pp.221–222.

Exhibit B at ¶ 10 ("Tape 2 concludes with Clendening and MARKUS making arrangements to speak after the first of the New Year."). Attorney Markus acted ethically during his conversations with Clendening and made clear to Clendening that despite Clendening's repeated references to needing money, Markus flatly and unequivocally refused to pay for testimony.[2]

Dr. Shaygan respectfully submits that the evidence is clear. DEA Agent Wells either invented or distorted Courtney Tucker's words to create a complaint of witness tampering. Based on that phantom complaint, members of the government trial team surreptitiously, and without proper authorization, took the drastic step of recording the defense strategies of their adversaries and doing so in a manner that corrupted fact witnesses in the pending trial.[3]

F. Jencks and *Kyles*: The Deception is Exacerbated

Both Vento and Clendening testified as government witnesses during the week of February 17, 2009. Both were presented as neutral fact witnesses by the government. There was no mention of their status as confidential informants. Thus, the government exacerbated its deception by concealing the status of these witnesses—as well as the recordings themselves—from the defense, from the Court, and from the jury.

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[2]The transcripts of the two recordings with Markus are attached as Exhibits C and D.

[3]Even if Tucker's complaint—that a defense investigator told her that she was subjecting herself to federal charges if she admitted to selling prescription medication—were true, that complaint would not justify converting two unrelated fact witnesses into informants to tape the defense team, including lawyers, regarding bribery. Wells never claimed that Tucker alleged that the defense was trying to pay her off.

At no point before trial, or even during the testimony of Vento and Clendening, did the prosecution team reveal that these witnesses were cooperating government informants who were recruited to record members of the defense team. Evidence of their bias and motive to please the government was obviously relevant to impeach their credibility as government witnesses. *Kyles v. Whitley*, 514 U.S. 419 (1995). Nor did the government ever reveal what benefits Vento and Clendening were promised by DEA Agent Wells in exchange for their cooperation in violation of *Brady* and *Giglio*.

Furthermore, the government did not produce the recordings before Vento and Clendening were cross-examined, as required by the Jencks Act. Agent Wells admits to listenting to Vento's recording of his conversation with investigator Graff and knew that it was discoverable under the Jencks Act. AUSA Cronin likewise knew at least that Vento had recorded a conversation with a member of the defense team. It is no excuse that the trial team was not in actual possession of the Clendening recordings at the time he testified. Those recordings were made by a government informant at the urging of the prosecution team and were therefore "in the possession of the United States" under 18 U.S.C. § 3500(b). *See United States v. Bosier*, 12 M.J. 1010 (A.C.M.R. 1982).

On February 23, 2009, the government disclosed for the first time that it had initiated the Vento and Clendening recordings when AUSA Gilbert told attorney Markus, during a court recess, that the tapes existed and that no one on the defense had done anything wrong. During a later recess that day, senior members of the United States Attorney's Office

informed the defense that the recordings were made in derogation of their internal rules. Indeed, those senior members informed attorney Markus that he was not under investigation and that AUSA Gilbert had authorized the recording only of investigators as opposed to attorneys. Evidently, even as of this week, these superiors were misled by their subordinates as to what had taken place, given that recordings of defense lawyers had been authorized.[4] In any event AUSA Gilbert had no authority to authorize ***any*** recordings.

III. MEMORANDUM OF LAW

This motion seeks relief for a pattern of egregious and serious government misconduct, including:

- the prosecution team's unlawful invasion of the defense camp by recording and eavesdropping on defense strategies;
- the failure to timely disclose to the defense that two government witnesses were confidential informants;
- the deception of the jury into believing that these informants were neutral fact witnesses;
- the failure to timely disclose the statements of these informants as required by the Jencks Act;
- the attempted intimidation of witness Courtney Tucker by the DEA; and
- the continuing deception regarding the reasons for and the extent of the invasion of

[4]United States Attorney R. Alexander Acosta, First Assistant Jeffrey Sloman, and Criminal Division Chief Robert Senior have responded to this matter with both integrity and candor.

the defense camp.

The government's unauthorized recording of defense interviews of witnesses it misrepresented as neutral non-informants is itself egregious and reprehensible. That the prosecution team apparently intended to allow Dr. Shaygan to be tried without the defense, this Court, or the jury knowing the status of its witnesses and in violation of the Jencks Act is so prejudicial that only the extreme sanction of dismissal can suffice to remedy this cavalier affront to due process.

A. Basic Principles

The Sixth Amendment right to counsel has been the cornerstone of our criminal justice system since before the adoption of the Constitution and the Bill of Rights. *Powell v. Alabama*, 287 U.S. 45, 61-64 (1932). It is a right which "[t]ime has not eroded" because it is "fundamental." *United States v. Cronic*, 466 U.S. 648, 653 & n. 8 (1984). Counsel are of paramount importance for the simple reason that "they are the means through which the other rights of the person on trial are secured." *Cronic*, 466 U.S. at 653. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *Id.* at 654 (citation omitted). *Accord Powell*, 287 U.S. at 68-69; *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Counsel play such an important role in our system of criminal justice because of the adversarial nature of that system. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate

objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). Through counsel, a defendant is permitted to put the government's case through "the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656. *See also Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) (observing that "an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation").

Our adversarial system, however, is subject not to the law of the jungle but rather is constrained by both the rule of law and rules of professional and ethical conduct. If prosecutors operate under a win-at-all-costs or ends-justify-the-means mentality, they undermine rather than serve the cause of justice. *See Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 386 (2004) (noting that criminal procedure differs from civil litigation because prosecutor operates "under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice."); *Berger v. United States*, 295 U.S. 78, 88 (1935) (prosecution's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

For this reason, the Sixth Amendment not only ensures that a defendant will have counsel but creates a zone of privacy or protection around the relationship, immunizing it from government interference and attack under all but extraordinary circumstances. "[A]t the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Maine v.*

Moulton, 474 U.S. 159, 168-69 (1985).

Since privacy is vital to effective representation and to the development of the attorney-client relationship itself, the government is forbidden from eavesdropping or planting agents to hear or disrupt counsels of the defense. *See, e.g., United States v. Henry*, 447 U.S. 264 (1980).

> The defendant has the right to prepare in secret, seeing and inviting those he deems loyal or those with whom he is willing to risk consultation. The prosecution's secret intrusion offends both the Fifth and Sixth Amendment.

In re Terkeltoub, 256 F. Supp. 683, 685 (S.D.N.Y. 1966) (citations omitted). Indeed, the principle is well established that surreptitious invasions by the government into meetings between attorneys and their clients or witnesses are forbidden, as is any attempt to stealthily uncover the defense's trial strategy.

The conduct of the prosecution team in this case is a violation of the right to counsel that merits dismissal of this case. In *Black v. United States*, 385 U.S. 26 (1966), and *O'Brien v. United States*, 386 U.S. 345 (1967), the Supreme Court invalidated convictions when it was learned that conversations between the defendant and his attorney were overheard through use of electronic listening devices installed by government agents on the defendants' telephones. In *Hoffa v. United States*, 385 U.S. 293, 306 (1966), the Supreme Court characterized similar conduct as a governmental intrusion of "the grossest kind," citing with approval *Caldwell v. United States*, 204 F.2d 879 (D.C. Cir. 1953), *cert. denied*, 342 U.S. 926 (1952), and *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342

U.S. 926 (1952). In *Caldwell*, the court found a Sixth Amendment violation where a federal agent, while posing as an assistant for the defense counsel, reported frequently to the prosecution on intimate matters of defense trial preparation and strategy. And, in *Coplon*, the court found a Sixth Amendment violation where government agents listened in on telephone conversations between the defendant and her attorney. More recently, in *United States v. Terzado-Madruga*, 879 F.2d 1099, 1110 (11th Cir. 1990), the Eleventh Circuit found a Sixth Amendment violation when the government sent an undercover informant to tape record conversations with the defendant. *See also United States v. Levy*, 577 F.2d 200 (3rd Cir. 1978) (dismissing indictment where government allowed attorney for defendant to also represent undercover informant who learned defense strategies); *United States v. Rispo*, 460 F.2d 965, 977-78 (3rd Cir. 1972) (characterizing as "shocking" and reversing defendant's conviction where government informant posed as a sham co-defendant and participated in conferences with defendant's attorney and with other defense counsel).[5]

To obtain relief for the constitutional violations resulting from the government's invasion of the defense camp, a defendant must show prejudice arising from the invasion. *Weatherford v. Bursey*, 429 U.S. 545, 552 (1977). To do so, a defendant need only show that the unlawfully intercepted, but otherwise privileged, materials or communications "were used in any . . . way" to the "substantial detriment" of the defense. 429 U.S. at 554. The

[5] Moreover, the Due Process Clause of the Fifth Amendment protects a defendant against governmental misconduct that is so outrageous that it is "shocking to the universal sense of justice." *United States v. Russell*, 411 U.S. 423, 432 (1976).

"substantial detriment" requirement encompasses far more than simply the introduction of the questioned evidence at trial. *Weatherford*, 429 U.S. at 556. Indeed, courts have identified the following factors to consider in determining whether the requisite amount of prejudice needed to establish a Sixth Amendment violation is present: (1) whether the government's intrusion was intentional; (2) whether the prosecution obtained confidential information pertaining to trial preparations and defense strategy as a result of the intrusion; and (3) whether the information obtained produced, directly or indirectly, any evidence used at trial, or was used in some other way to the defendant's substantial detriment. *United States v. Noriega*, 764 F.Supp. 1480, 1489 (S.D.Fla. 1991). "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation." *United States v. Morrison*, 449 U.S. 361, 364 (1981). In this case, the government's conduct satisfied all of the criteria and the government's concealment of its activities through much of the trial made a narrowly tailored remedy impossible.

Federal courts must "protect[] the judicial process from the stigma of illegal or unfair government conduct." *United States v. Linton*, 502 F. Supp. 861, 865-66 (D. Nev. 1980). Such misconduct can take several forms. The most serious illegal or unfair government conduct is "outrageous" misconduct that "shocks the conscience" and is so intolerable that it violates the defendant's due process rights under the Fifth Amendment. *See United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008) ("a district court may dismiss an indictment

on the ground of outrageous government conduct if the conduct amount to a due process violation"); *United States v. Wang*, 1999 WL 138930, at *37 (S.D.N.Y. Mar. 15 1999) (dismissing indictment due to the government's failure to provide defense counsel with "material information" until the "eve of trial"); *United States v. Lyons*, 352 F. Supp. 2d 1231, 1251-52 (M.D. Fla. 2004) (dismissing indictment to the government's multiple violations); *United States v. Sabri*, 973 F. Supp. 134, 147 (W.D.N.Y. 1996) (dismissing part of indictment where government obtained evidence against defendant from his civil lawyer); *United States v. Marshank*, 777 F. Supp. 1507, 1524 (N.D. Cal. 1991) (dismissing indictment where government interfered in the attorney-client relationship by using his former attorney to obtain incriminating information).

Even where government misconduct is not sufficiently "outrageous" to violate due process, the Court under its supervisory powers may impose various sanctions, including dismissal. *Chapman*, 524 F.3d at 1084 (affirming dismissal pursuant to the court's supervisory powers due to government's violation of discovery obligations and flagrant misrepresentations to court). Such a sanction is mandated here not only because of the invasion of the sanctity of the defense team, but because in utilizing purportedly neutral fact witnesses to conduct its "taint" investigation, the government itself introduced incurable taint into these proceedings. Assuming that an investigation into misconduct on the defense team was appropriate (it obviously was not), the government's ill-advised and unauthorized decision to conduct this investigation under the supervision of the case agent and with

participation of two of the nine patients charged in the indictment introduced a fatal infection into these proceedings.

Under the circumstances of this case, the appropriate remedy is dismissal. "Repeated instances of deliberate and flagrant misconduct justify dismissal of the indictment." *United States v. Omni Intern. Corp.*, 634 F. Supp. 1414, 1438 (D. Md. 1986) ("Court decisions emphasize the unifying premise in all of the supervisory power cases – that although the doctrine operates to vindicate a defendant's rights in an individual case, it is designed and invoked primarily to preserve the integrity of the judicial system. The Court has particularly stressed the need to use the supervisory power to prevent the federal courts 'from becoming accomplices to such misconduct.'") (citations omitted; emphasis added)).[6]

The Ninth Circuit in *Chapman* recently affirmed a district court's dismissal of an indictment three weeks into trial. In that case, there were Brady and Giglio violations.

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[6]Unlike cases like *United States v. Horn*, 29 F.3d 754 (1st Cir. 1994), where the misconduct comes to light before trial, this misconduct only came to light during trial. In *Horn*, the district court "stitched together a serviceable fabric of narrowly tailored remedies" to sanction the government for secretly having a copy center employee keep records on which discovery documents the defense lawyer requested be copied.

> The court ordered the government to provide the defense with summaries of its witnesses' testimony and lists of its exhibits; permit the defense to depose the two potential witnesses who had been exposed to the bootleg documents; refrain from referring at trial to the substance of the documents except in response to defense references; and remove the lead prosecutor from the case.

Id. at 759.

Because the government concealed its recordings until one of its witnesses let the cat out of the bag well into the trial, this Court does not have the options the district court had in *Horn* to make this trial fair. Moreover, the misconduct in this case was far more egregious than in *Horn*. Only dismissal of the charges will suffice under these circumstances.

Recalling the prior witnesses was impractical and would not cure the error – as is the case here. And a mistrial would only have rewarded the government by giving it a second chance to try its case. Therefore, dismissal of the indictment was the only appropriate remedy. Counsel for Chapman's co-defendant argued that the "late disclosures made the trial 'nothing more than a colossal waste of everybody's time." *Id.* at 1079. That sentiment is apt here. After these witnesses already have testified with the jury thinking that they were neutral fact-witnesses, the government discloses that illegal tape recordings were made and that these witnesses were actually confidential informants. This violation cannot be fixed. Coupled with the outrageous misconduct of the taping itself, an dcoupled with the non-disclosure of those illegal tapes, this Court should dismiss the indictment.

B. <u>In the Alternative, an Evidentiary Hearing Is Requested</u>

If the Court is not prepared to dismiss the indictment on this record, we respectfully request that the Court conduct an evidentiary hearing to allow the defense to establish prejudice. To satisfy the *Weatherford* standard of prejudice, a defendant is entitled to an evidentiary hearing if the allegations of a defense camp invasion "are sufficient to warrant further factual inquiry." *United States v. Kelly*, 790 F.2d 130, 134 (D.C. Cir. 1986) (remanding for an evidentiary hearing on claim that FBI invaded the defense camp); *see also United States v. Noriega*, 764 F.Supp. 1480 (S.D.Fla. 1991) (holding an evidentiary hearing on Gen. Noriega's claim that the government invaded the defense camp by listening to his prison recordings with his lawyer); *United States v. Boffa*, 89 F.R.D. 523, 528 (D. Del. 1981)

(ordering an evidentiary hearing on allegation that the government intruded into the defendants' attorney-client relationships when some of the defendants and their attorneys had conversations with an informant concerning defense strategy).

Here, an evidentiary hearing is required to determine what use the prosecution team made of the 28 minute interview by investigator Graff of witness Vento. Agent Wells admits that he listened to at least one recording two months before the commencement of trial. An evidentiary hearing would also bring to light whether Agent Wells has engaged in a pattern of intimidation of witnesses, similar to his twisting of Courtney Tucker's words during a pretrial interview. *United States v. Scheer*, 168 F.3d 445 (11th Cir. 1999) (noting that district court held an evidentiary hearing on claim that prosecutor had intimidated a key prosecution witness). A hearing is also required because the government's concealment of its misconduct violated its disclosure obligations under *Brady* and the Jencks Act. *United States v. Espinosa-Hernandez*, 918 F.2d 911, 913-14 (11th Cir. 1990) (remanding for an evidentiary hearing on non-disclosure of agent's misconduct). Given the misconduct to date, the government's representations that no promises or benefits were offered to those witnesses in exchange for their cooperation should be made under oath and subject to cross-examination, as should the assertion that no other witnesses were approached to become government informants.

In the absence of dismissal, the government's explanation for its invasion of the defense camp warrants closer scrutiny and adversarial testing. Agent Wells' claim in his sworn affidavit that Courtney Tucker complained about witness tampering is contradicted

by Ms. Tucker's sworn testimony at trial (and would be contradicted by the sworn statement of the investigator if he was called to testify). Thus, this Court may need to resolve that factual question. If Agent Wells fabricated or exaggerated that complaint as a ruse to justify the secret recording the defense, and thereby mislead this Court, that is an additional reason that the most drastic remedy should follow. Although the Court ordered the government to submit affidavits, AUSA Sean Cronin has not submitted anything under oath regarding his involvement. Based on the facts outlined above, Mr. Cronin's personal animus toward the defense is evident. His threat to "seismic[ally] shift" the prosecution should be explored in connection with seeking approval from AUSA Gilbert to tape-record the defense team.

The affidavits submitted at the Court's direction raise as many questions as they answer. Accordingly, if the Court is not prepared to dismiss the case based on the already available record, this Court should conduct an evidentiary hearing to further investigate the facts of the government's misconduct and determine the appropriate remedy.

IV. CONCLUSION

WHEREFORE Dr. Shaygan requests an Order dismissing the Indictment or for an evidentiary hearing on this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH LOCAL RULE 88.9

A copy of the foregoing was served through the electronic filing system on March 1, 2009, on AUSA Sean Cronin.

In an effort to resolve the issue raised by this motion, I conferred with government lawyers who advise that the United States opposes this motion.

/s/ David Oscar Markus
David Oscar Markus