Representing Controversial Clients...
And The Potential Consequences

OBI Presentation By J. Mark Shelnutt, Attorney At Law
October 3, 2018

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	INDICTMENT NUMBER:
	)	4:09-CR-14 (CDL)
J. MARK SHELNUTT,	)	
	)	
Defendant.	)	

MOTION FOR ATTORNEY'S FEES AND LITIGATION EXPENSES PURSUANT TO THE HYDE AMENDMENT, 18 U.S.C. § 3006A, NOTE, AND THE EQUAL ACCESS TO JUSTICE ACT, 28 U.S.C. § 2412

COMES NOW, Mark Shelnutt, Defendant or Movant herein, and files this, his Motion for Attorney's Fees and Litigation Expenses Pursuant to the Hyde Amendment, 18 U.S.C. § 3006A, Note, and the Equal Access to Justice Act, 28 U.S.C. § 2412, and respectfully requests that this Court grant his Motion and award Movant reasonable attorney's fees and litigation expenses, and shows the following:

I. INTRODUCTION AND SUMMARY OF GROUNDS FOR ATTORNEY'S FEES AND LITIGATION EXPENSES

Mark Shelnutt has been a widely respected member of the Columbus, Georgia, community for over two decades. He has also been a prominent and distinguished member of the local bar, an Assistant District Attorney, and a man of selfless devotion to his family, church and community. As a lawyer in private practice, Mark Shelnutt represented numerous persons in need, including numerous criminal defendants charged with drug offenses, just as he had formerly prosecuted such individuals to the fullest extent of the law as a prosecutor. Until the charges in this case, he had never been accused of any criminal wrongdoing, ever.

In May of this year, the Government indicted Mr. Shelnutt in a kitchen sink indictment, Doc. # 1, charging him with 40 counts of alleged criminal activity, including alleged money laundering conspiracy, in violation of 18 U.S.C. § 1956(h) (Count One); alleged aiding and abetting a conspiracy to distribute controlled substances, in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2 (Count Two); alleged failure to file Financial Crimes Enforcement Network (FINCEN) Form 8300, in violation of 31 U.S.C. §

5322(b) and 31 U.S.C. § 5331 (Counts Three and Four); alleged money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B) (Counts Five through Thirty-Five); alleged attempted bribery, in violation of 18 U.S.C. § 201(b)(1) (Count Thirty-Six); alleged witness tampering, in violation of 18 U.S.C. § 1512(b)(1); and alleged false statements, in violation of 18 U.S.C. § 1001 (Counts Thirty-Eight through Forty). The Government's charges arose out of Mr. Shelnutt's representation of Torrance Hill, the largest drug trafficker in the history of the Columbus area. *See id.*, at 3. Hill was was also implicated in a number of murders The Government proceeded to trial against Mr. Shelnutt on November 9, 2009, *see* Docs. # 117, 118, 122, 127, 128, 129, 130, 131. During trial, the Government dismissed Counts Three, Four, Thirty-Seven and Forty against Mr. Shelnutt. *See* Doc. # 123. At the conclusion of the trial, the jury returned a verdict of not guilty in favor of Mr. Shelnutt on all remaining counts. *See* Docs. # 123, 124.

The Government's charges against Mr. Shelnutt were vexatious, frivolous or in bad faith sufficient to authorize an award of Mr. Shelnutt's reasonable attorney's fees and litigation expenses pursuant to the Hyde Amendment, 18 U.S.C. § 3006A, Note, and the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. ***The Government possessed clear, unequivocal evidence from Hill and others completely exonerating Mr. Shelnutt of any alleged wrongdoing prior to trial. The Government also knew prior to trial, or should have known, that all of its charges against Mr. Shelnutt were factually and/or legally unsustainable. In particular, the Government knew, prior to trial, that receipt of monies for fees for legal representation alone, even where the monies are proceeds of specified unlawful activity, cannot constitute money laundering.*** The vexatious, frivolous, bad faith and harassing nature of the Government's charges against Mr. Shelnutt was underscored by the Government's conduct leading up to, and at trial:[1]

- The defense gave notice to the Government prior to trial, of the Eleventh Circuit Court of Appeals' opinion in *United States v. Velez*, No. 09-10199, 2009 WL 3416116 (11th Cir., October

[1] Mr. Shelnutt does not possess the trial transcript of this matter, so all statements herein are made to the best of his and his counsel's recollection, information and belief, based upon his and his counsel's participation in the proceedings and presence at trial.

26, 2009), which reinforced the rule that receipt of monies for fees for legal representation alone, even where the monies are proceeds of specified unlawful activity, cannot constitute money laundering. The Government responded to the defense that it intended to proceed to try Mr. Shelnutt on money laundering charges.[2] This Court asked Torrance Hill directly if all of the monies paid to Mr. Shelnutt were for legal fees, ***and Hill answered YES and stated that he had informed the prosecution of this fact.***

- The Government had in its possession clear statements by Torrance Hill, Tamika Hill, Shawn Bunkley and Latea Davis ***exculpating Mr. Shelnutt of any wrongdoing before*** it indicted Mr. Shelnutt.
- The defense played an audio recording of Torrance Hill reading a letter which he later sent to Assistant United States Attorney (AUSA) Jason Ferguson which stated, in effect, that Mr. Shelnutt "had done nothing wrong." AUSA Ferguson admitted on cross-examination that he was in possession of this and other "letters" from Hill. These letters were not provided to the defense and indisputably constituted exculpatory evidence.
- AUSA Ferguson testified, in effect, that the cases against Hill's co-conspirators, Tamika Hill, Shawn Bunkley, Latea Davis and Choici Lawrence in the proceeding of *United States v. Davis et al.*, Case No. 4:08-CR-00008-CDL-GMF (M.D.Ga. 2008) started "crumbling" or "falling apart" ***because of*** co-conspirator statements implicating these individuals in the conspiracy. The Government agreed to grant pretrial diversion to Davis and Lawrence and to enter into agreements for reduced sentences with Torrance Hill and Bunkley. Tamika Hill entered into an agreement with State authorities that did not call for any jail time. The defense observes that the Government entered into a plea agreement with Bunkley, drug kingpin Torrance Hill's right-

[2] To the best of counsels' recollection, when the parties were discussing the *Velez* opinion during trial, counsel for the Government argued, in effect, that the Eleventh Circuit had just issued the opinion.

hand man, to recommend that Bunkley be sentenced to between 36 and 47 months imprisonment, but that last week this Court sentenced Bunkley to approximately ten years.[3]

- The defense showed that Shawn Bunkley deliberately lied in his testimony before the grand jury regarding his receipt of monies from the sale of a car and his alleged payment of $120,000 to Mr. Shelnutt in a grocery store parking lot. The Government was aware that Bunkley had given false testimony before the grand jury and yet, instead of charging Bunkley with perjury, it summoned Bunkley to testify before the grand jury a second time to "correct" his testimony. The Government also recalled Berry Shelnutt Day & Hoffman secretary Joanne Strickland to testify before the grand jury a second time so that she could "correct" her prior grand jury testimony regarding the alleged amount of money Mr. Shelnutt had loaned to her, despite the fact that Ms. Strickland had her banking records reflecting the transaction prior to her first grand jury appearance.
- The Government presented testimony through Internal Revenue Service (IRS) case agent, Special Agent Cindy Meyers, that all the deposits into Chris Shelnutt's account related to Torrance Hill. The defense showed, on cross-examination, that the Government failed to present to the jury evidence in its possession relating to deposits from 2003 and 2004, which was a willful effort to create a false inference and mislead the jury. The defense furthermore obtained additional banking and financial records for Mr. Shelnutt and his law firm which the Government had not obtained which showed that the deposits and mortgage payments which the Government alleged in its Indictment to be criminal were entirely consistent with deposits and mortgage payments by Mr. Shelnutt both before and after his representation of Torrance Hill.
- The Government shifted its prosecution theories throughout the trial. After Torrance Hill admitted that any monies he paid to Mr. Shelnutt were for attorney's fees, counsel for the Government argued to the Court that any fees paid to Mr. Shelnutt were "illegitimate," despite Mr. Shelnutt's representation of Hill and others and despite the Government's failure to prove

[3] The defense is in the process of obtaining the transcript to Bunkley's sentencing hearing.

that Hill and others actually paid Mr. Shelnutt the amounts alleged in the Indictment. And when the Government produced no evidence related to the IRS/Financial Crimes Enforcement Network (FinCEN) Form 8300 charges, it attempted to argue that Mr. Shelnutt should be convicted of structuring currency transactions instead in violation of 31 U.S.C. § 5324, despite its failure to allege this offense in its Indictment.

- Counsel for the Government made false and misleading statements in closing arguments to the jury using a video and audio recording of conversations between Tamika Hill and Mr. Shelnutt during a meeting in January 2007. The recording in context showed that the alleged statements by Mr. Shelnutt related to Tamika Hill's attorney Derrick Wright, and not any asserted involvement in a drug or money laundering conspiracy.

The Government's entire investigation and prosecution of Mr. Shelnutt evinced an intent by the Government to convict Mr. Shelnutt at any cost, including at the cost of letting key players in the "largest" drug trafficking organization in the history of the Columbus area go free, and ignoring evidence and law clearly indicating that Mr. Shelnutt had done nothing wrong. The Government's baseless, vexatious, frivolous, bad faith, harassing and stubborn prosecution of Mr. Shelnutt has inflicted untold stress, damage and financial loss on Mr. Shelnutt and his family, and has caused immeasurable damage to his formerly thriving law practice and reputation in the community. Accordingly, for the reasons set forth herein, the Government's position in regard to the charges was vexatious, frivolous, or in bad faith, and Mr. Shelnutt is entitled to reasonable attorney's fees and litigation expenses incurred in defending against the Government's investigation and charges under the Hyde Amendment, 18 U.S.C. § 3006A, Note, and the EAJA, 28 U.S.C. § 2412. The attorney's fees and litigation expenses which Mr. Shelnutt incurred in defending against the Government's investigation and charges are set forth in the Affidavit of John Mark Shelnutt, and attachments thereto, attached as Exhibit A. The Government's position in prosecuting Mr. Shelnutt was not substantially justified, and there are no circumstances which would make such an award unjust. Mr. Shelnutt further submits that this Court is authorized to award an amount greater than the amount of attorney's fees and litigation expenses Mr. Shelnutt actually

paid in defending against the Government's charges, and/or to find that the hourly limits in the EAJA should be exceeded.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. Awards of Attorney's Fees and Litigation Expenses Under the Hyde Amendment, 18 U.S.C. § 3006A, Note

The "Hyde Amendment" was enacted by Congress in the Act of Nov. 26, 1997, Pub.L. No. 105-119, tit. VI, § 617, 111 Stat. 2440, 2519 (1997), *reprinted in* 18 U.S.C. § 3006A, Note (2006). The Amendment provides, in relevant part, that:

> 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 [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. 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...

18 U.S.C. § 3006A, Note (emphasis added).[4] The Hyde Amendment references 28 U.S.C. § 2412, the Equal Access to Justice Act (EAJA), which provides, in relevant part, that:

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[4] The controversial Amendment was primarily sponsored by Illinois Representative Henry Hyde, in response to fellow Congressmen Pennsylvania Representative John Murtha, and Rep. Murtha's friend Pennsylvania Representative Joseph McDade, who was eventually acquitted of conspiracy, racketeering and bribery charges in the action of *United States v. McDade*, Case No. No. 92-cr-00249 (E.D.Pa. 1992), at great personal expense. Rep. Hyde argued for passage of the Amendment to Congress as follows:

> 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.... [U]nder my amendment..., [if the government] cannot prove substantial justification after the case is over, and the verdict is not guilty, then the prosecution pays something toward the attorney's fees of the victim.

> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

28 U.S.C. § 2412(d)(1)(B); *see also United States v. Aisenberg*, 358 F.3d 1327, 1339 (11th Cir. 2004) ("[A]ll 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)") (citing *United States v. Knott*, 256 F.3d 20, 26-27 (1st Cir. 2001); *United States v. Sherburne*, 249 F.3d 1121, 1129 (9th Cir. 2001); *United States v. Ranger Elec. Communications, Inc.*, 210 F.3d 627, 633 (6th Cir. 2000)).

For entitlement to an award of attorney's fees and litigation expenses under the Hyde Amendment:

> 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."

United States v. Adkinson, 247 F.3d 1289, 1291 n. 2 (11th Cir. 2001) (*per curiam*) (quoting Hyde Amendment, 18 U.S.C. § 3006A; 28 U.S.C. § 2412).[5] "The key language [of the Amendment] requires a successful criminal defendant to establish that the position the government took in the prosecution was "vexatious, frivolous, or in bad faith." Those words are not defined in the statute, so they "must be given their ordinary meaning." *United States v. Gilbert*, 198 F.3d 1293, 1300 (11th Cir. 1999) (citing *Chapman v. United States*, 500 U.S. 453, 462, 111 S.Ct. 1919 (1991)). The Eleventh Circuit Court of Appeals has defined the terms "vexatious," "frivolous," and "bad faith" as follows:

> 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

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United States v. Gilbert, 198 F.3d 1293, 1300 (11th Cir. 1999) (quoting 143 Cong. Rec. H7786-04, H7791 (Sept. 24, 1997) (Statement of Representative Hyde)).

[5] The Government's Indictment against Mr. Shelnutt was returned, and Mr. Shelnutt was acquitted, after fiscal year 1998, and his net worth did not exceed $2,000,000 during the pendency of the action, pursuant to 28 U.S.C. § 2412(d)(2)(B)(i).*See* Exhibit A, ¶¶ 2, 3, 4.

> obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will.

Adkinson, at 1291 n. 2 (quoting *Gilbert*, at 1299-99). Other courts have arrived at somewhat different definitions. "Vexatious" has been defined as "'lacking justification and intended to harass.'" *Sherburne*, 249 F.3d at 1126 (quoting *Webster's Third New Int'l Dictionary* 2548 (3d ed.1961); *citing* 19 *Oxford English Dictionary* 586 (2d ed.1989)); *see also United States v. Holland*, 34 F.Supp.2d 346, 359-360 (E.D.Va. Feb 03, 1999) (Opinion and Order), *opinion vacated in part on reconsideration by United States v. Holland*, 48 F.Supp.2d 571 (E.D.Va. May 18, 1999), *affirmed by United States v. Holland*, 214 F.3d 523 (4th Cir. 2000) ("'[V]exatious is defined as 'causing or likely to cause vexation... lacking justification and intended to harass.' 'Vexation' is defined as 'agitation, annoyance... harassment by process of law'") (quoting *Merriam-Webster's New International Dictionary*, 1993 Ed.). "Frivolous" has been is defined as "'of little weight or importance; having no basis in law or fact ... light, slight, sham, irrelevant, superficial.'" *Holland*, at 359 n. 22 (E.D.Va. Feb 03, 1999) (quoting *Merriam-Webster's New International Dictionary*, 1993 Ed.). "'*The plain meaning of the [Hyde Amendment] text indicates that the test is disjunctive- satisfaction of any one of the three criteria (vexatiousness, frivolousness, or bad faith) should suffice by itself to justify an award.*'" *United States v. Braunstein*, 281 F.3d 982, 994 (9th Cir. 2002) (emphasis added) (quoting *United States v. Tucor Int'l, Inc.*, 238 F.3d 1171, 1178 (9th Cir. 2001)).

> A motion under the Hyde Amendment implicates interests identical to those implicated by one under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412: "In each case, the movant is seeking an award of attorney's fees [and expenses] based upon a litigating strategy employed by the government that, the movant claims, conflicts with certain statutorily defined notions of fair play."

United States v. Claro, 579 F.3d 452, 456 (5th Cir. 2009) (quoting *United States v. Truesdale*, 211 F.3d 898, 904 (5th Cir. 2000)).

B. <u>The Government's Position and Charges Were Vexatious, Frivolous or in Bad Faith</u>

The Government lacked any legal or factual basis to charge Mr. Shelnutt with any alleged criminal activity. Each and every one of the Government's counts in its Indictment against Mr. Shelnutt

were vexatious, frivolous or in bad faith within the meaning of the Hyde Amendment. This conclusion is inescapable given the Government's possession of statements by its key witnesses and alleged co-conspirators, Torrance Hill, Latea Davis and Shawn Bunkley admitting, on tape, *that Mr. Shelnutt had not engaged in any wrongdoing*. The defense played numerous audio recordings of telephone calls between Torrance Hill, Tamika Hill, Davis and Bunkley and others in which they made statements exculpating Mr. Shelnutt.[6]

In addition Torrance Hill wrote letters to AUSA Feguson containing exculpatory statements regarding Mr. Shelnutt, including a letter which the defense played a recording at trial of Hill reading. None of these letters were not provided to the defense, in violation of *Brady v. Maryland*. 373 U.S. 83, 83 S.Ct. 1194 (1963).

The Eleventh Circuit Court of Appeals and other courts have sustained awards for attorney's fees and litigation expenses under the Hyde Amendment where the Government ignores evidence or controlling law in prosecuting a defendant, or misrepresents evidence. *See Aisenberg*, 358 F.3d at 1335 (reducing award of $2,680,602.22 in attorney's fees to $1,298,980.00 in attorney's fees and litigation

[6] As this Court is aware, Mr. Shelnutt has previously raised instances of misconduct by the Government in Defendant's Motion to Dismiss Indictment For Outrageous Governmental Misconduct. Mr. Shelnutt recognizes that the Court, at the July 14, 2009, motions hearing, previously found these instances to be insufficiently outrageous to justify dismissal of the Government's Indictment, however he respectfully submits that this Court may consider these instances in determining whether or not an award under the Hyde Amendment may be appropriate. In brief, the evidence presented at the hearing showed that AUSA Jason Ferguson and AUSA Mel Hyde repeatedly refused to inform Mr. Shelnutt that he was a target of the criminal investigation, despite Mr. Shelnutt's expressing serious concerns regarding the propriety of his continuing to represent Torrance Hill and Choici Lawrence in the criminal proceedings. AUSA Jason Ferguson and Federal Bureau of Investigation (FBI) Special Agent Todd Kalish also lied to Mr. Shelnutt regarding whether he was being recorded during a meeting between AUSA Ferguson, Special Agent Kalish and Mr. Shelnutt. In addition, the Government co-opted attorney Mark Casto, who represented Bunkley in the criminal proceeding, and used him as an informant to record telephone calls with Mr. Shelnutt. Another court in this Circuit has recently concluded that an award of attorney's fees and costs was warranted based in part on the fact that the prosecution and Drug Enforcement Administration (DEA) agents used informants who were not formally established DEA informants to record conversations with defense attorneys and investigators without their knowledge. *United States v. Shaygan*, No. 08-20112-CR, 2009 WL 980289, *13-15, *29 (S.D.Fla., April 09, 2009) (Order on Defendant's Motion for Sanctions Under Hyde Amendment). The Government disingenuously informed Mr. Shelnutt's counsel of a "credible" death threat against Mr. Shelnutt and AUSA Hyde, but failed to offer any protection or information to Mr. Shelnutt. Evidence was also presented at trial that AUSA Charles Bourne, AUSA Ferguson and DEA Agent Stephen Ribolla met with Torrance Hill prior to his testifying before the grand jury, without counsel, and pressured Hill to turn against Mr. Shelnutt.

expenses of $195,670.32, where the appellees were prosecuted for alleged false statements in relation to the disappearance of their daughter, and the government dismissed the indictment against the appellees after the district court found that investigating county detectives made false statements, statements in reckless disregard for the truth, and omitted material facts in wiretap applications; failed to inform the state circuit court that they had not yet interviewed several witnesses and that they were still waiting for the crime lab to process evidence and for a financial analysis of the appelleees; reported and quoted alleged telephone conversations in their wiretap applications which were either not present or not intelligible on the tapes and "deliberately or with reckless disregard summarized conversations out of context," intercepted communications which were unrelated to the offenses and failed to minimize the recordings of conversations not otherwise subject to the interception authorization); *Sherburne*, 249 F.3d at 1125 (affirming the trial court's award of attorney's fees under the Hyde Amendment to the defendants who had charges against them relating to alleged abuses in the construction of a housing development on an Indian reservation dismissed, observing that the government had "distorted the truth," "ignored evidence," and failed to present facts establishing any false representations); *Braunstein*, 281 F.3d at 996 (concluding that the government's position that the defendant had engaged in wire fraud, interstate transportation of goods obtained by fraud, and money laundering in selling discounted computers to domestic distributors and resellers, despite evidence that computer company was aware of the defendant's actions and had no agreement with the defendant, "was so obviously wrong as to be frivolous"); *United States v. Claro*, No. Crim. H-04-126-1 2007 WL 2220980, *6 (S.D.Tex. Jul 31, 2007) (Opinion on Defense Fees and Expenses) (unpublished), *affirmed in part, vacated in part by, Claro*, 579 F.3d 452 (awarding $391,292.29 in fees and expenses under the Hyde Amendment where court had dismissed indictment for conspiracy, mail fraud, and money laundering against the defendant, observing that the government had no evidence to support its allegations and that "[the defendant] defended himself for nearly sixteen months from fifty-four counts derived from shifting legal theories and inaccurate representations of the facts").

Despite the Government's efforts to convict him at all costs, Mr. Shelnutt prevailed against all 40 of the Government's charges against him. However, the devastation to his family, career and reputation has been irreparable.

1. Money Laundering and Money Laundering Conspiracy

In Count One of its kitchen sink Indictment against Mr. Shelnutt, the Government alleged that, for over three years, Mr. Shelnutt knowingly engaged in an alleged money laundering conspiracy by allegedly attempting to conduct financial transactions in violation of 18, United States Code, Section 1956(a)(1)(B)(i), in violation of 18 U.S.C. § 1956(h). Doc. # 1, p. 1-3.. The Government also charged Mr. Shelnutt with thirty alleged acts of money laundering in violation of § 1956(a)(1)(B) in Counts Five through Thirty-Five.

The Government's charges and allegations wholly ignored the rule, approved by the Eleventh Circuit Court of Appeals *prior* to the indictment of Mr. Shelnutt, that "**an attorney may lawfully receive money as fees for representing persons charged with crimes** as long as he does not violate Title 18, United States Code, Section 1956(a)(1)(B)(i)." *United States v. Elso*, 422 F.3d 1305, 1310 (11th Cir. 2005) (emphasis added). Moreover, the Court of Appeals reaffirmed, shortly before the trial of Mr. Shelnutt, that, under the companion money laundering provision, 18 U.S.C. § 1957, "transactions involving criminally derived proceeds are exempt... when they are for the purpose of securing legal representation to which an accused is entitled under the Sixth Amendment." *United States v. Velez*, No. 09-10199, 2009 WL 3416116, *1 (11th Cir., October 26, 2009).[7]

Accordingly, as a matter of law, even if Mr. Shelnutt "knew" any cash delivered by Torrance Hill, Tamika Hill, Bunkley, Davis or others was the proceeds of a drug trafficking conspiracy, this fact would not constitute a crime, and would not establish that Mr. Shelnutt engaged in an alleged money laundering conspiracy.[8] Torrance Hill admitted to the Court that *all* of the monies which he directed to

[7] Mr. Shelnutt shows that the government dismissed similar charges against Miami, Florida, attorney and defendant Benjamin Kuehne shortly following the jury's acquittal of Mr. Shelnutt.

[8] An additional bit of evidence that the Government's investigation and prosecution of Mr. Shelnutt was vexatious, frivolous or in bad faith is the fact that Torrance Hill also retained other counsel to represent

be paid to Mr. Shelnutt were for attorney's fees, and that he had informed the prosecution of this fact. The defense provided the Government with the Eleventh Circuit's opinion in *Velez* prior to trial, however the Government elected to proceed to trial against Mr. Shelnutt in the face of controlling authority that flatly rebuked its theory of prosecution. The defense also showed at trial that Bunkley lied to the grand jury regarding the $120,000 he purportedly paid Mr. Shelnutt.

In view of the fact that all monies received by Mr. Shelnutt were for attorney's fees, *which could not constitute a crime as a matter of law*, it is clear that the Government possessed no reasonable or probable cause to charge Mr. Shelnutt with any wrongdoing, and that its prosecution of Mr. Shelnutt was vexatious. The prosecution of Mr. Shelnutt was also frivolous in that it was groundless or was brought to embarrass, annoy or harass Mr. Shelnutt, and was in bad faith. The Eleventh Circuit has affirmed awards of attorney's fees and litigation expenses where the government has prosecuted defendants in disregard of controlling legal authority. *See Adkinson*, 247 F.3d at 1292 (affirming that the defendants, who were prosecuted for conspiracy to defraud the United States in relation to a real estate development deal, were entitled fees and expenses under the Hyde Amendment where "the government, '[w]ith full knowledge that it was contrary to recent and controlling precedent, ... induced the grand jury' to charge..." the defendants) (quoting *United States v. Adkinson*, 135 F.3d 1363, 1374 (11th Cir. 1998)).

The other acts alleged by the Government also could not form the basis for concealment money laundering or money laundering conspiracy charges. The Eleventh Circuit has expressly held that evidence of concealment must be "substantial." *United States v. Majors*, 196 F.3d 1206, 1213 (11th Cir. 1999) (citing *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1475 (10th Cir. 1994)). The Court has held that "*simple and straightforward banking transactions, easily discovered through a cursory review of... bank accounts*," *United States v. Johnson*, 440 F.3d 1286, 1293 (11th Cir. 2006) (*per curiam*) (emphasis added), do *not* constitute concealment money laundering, *id.* (Emphasis added). And the

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him in the criminal proceedings, however there is no indication in the record that the Government ever investigated the propriety of those payments for legal representation.

Court has held that mere payment of mortgage or lease payments with drug money and without any evidence that the defendant attempted to conceal or disguise the source of the payments does not constitute concealment money laundering. *See United States v. Newton*, 44 F.3d 913, 922 (11th Cir. 1994).

Accordingly, mere bank deposits or mortgage payments by Mr. Shelnutt, even if made with proceeds of specified unlawful activity, could not, as a matter of law, constitute concealment money laundering. Furthermore, the Government ignored and did not bother to obtain banking and financial records for Mr. Shelnutt and his law firm which would have established that the deposits and mortgage payments were consistent with deposits and payments before and after Mr. Shelnutt's representation of Torrance Hill. The Government failed entirely to trace any alleged deposits into Mrs. Chris Shelnutt's Columbus Bank and Trust (CB&T) account to *any* specific payments by Torrance Hill, Tamika Hill, Bunkley or Davis. Mr. Shelnutt's and his firm's banking and financial records indisputably demonstrated that Mr. Shelnutt received numerous payments for legal representation from hundreds of clients other than Torrance Hill and his associates, in small amounts and in many cases in cash. Mrs. Chris Shelnutt also testified how Mr. Shelnutt received monies from his purchase of baseball cards by credit card, which he subsequently sold, and how the Shelnutts kept amounts of cash in their home as a reserve to meet needs as they arose, including by making partial payments on the mortgages on properties they owned in Florida and North Carolina. The legal and factual groundlessness of the Government's money laundering and money laundering conspiracy charges, along with the Government's failure to investigate Mr. Shelnutt's deposits and payments prior to, or after, his representation of Hill, compel a conclusion that the charges were vexatious, frivolous or bad faith.

Finally, the defense proved the allegation that Mr. Shelnutt allegedly laundered money by depositing money into Joanne Strickland's account and receiving a check back from the secretary to be entirely meritless. The evidence at trial definitely established that Mr. Shelnutt loaned Ms. Strickland money for her daughter's wedding as a favor, and that Ms. Strickland repaid Mr. Shelnutt the majority of the loan.

The Government's money laundering and money laundering conspiracy charges against Mr. Shelnutt had no basis in fact or law and were vexatious, frivolous and in bad faith. The Government presented no evidence at trial that Mr. Shelnutt received any monies for any purposes other than legal representation, or that he did anything with any monies he received which would have amounted to "substantial" evidence of concealment. This Court is authorized to award reasonable attorney's fees and litigation expenses pursuant to the Hyde Amendment.

2. Aiding and Abetting a Conspiracy to Distribute Cocaine

The Government's asserted charge against Mr. Shelnutt for allegedly aiding and abetting a conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2 in Count Two of the Indictment was vexatious, frivolous or in bad faith as a matter of law. Doc. # 1, p. 3-4. In order to convict Mr. Shelnutt of such an offense, the Government was required to show that Mr. Shelnutt either agreed to commit, or aided and abetted the commission of, *violations of federal drug laws. See United States v. Dekle*, 165 F.3d 826, 829 (11th Cir. 1999) (citing *United States v. Toler*, 144 F.3d 1423, 1426 (11th Cir. 1998); *United States v. Parrado*, 911 F.2d 1567, 1570 (11th Cir. 1990)); *United States v. Newton*, 44 F.3d 913, 921 (11th Cir. 1994) (quoting *United States v. Perez*, 922 F.2d 782, 786 (11th Cir. 1991)). The Government made no allegation—and failed to produce or present an iota of evidence—that Mr. Shelnutt ever willfully committed any act with the intent of facilitating the distribution of cocaine or any drug transaction. This Court may accordingly find that the Government's position with respect to this charge to be vexatious, frivolous or in bad faith for the purposes of the Hyde Amendment.

3. Failure to File FINCEN Form 8300

The Government's charges against Mr. Shelnutt for alleged failure to file IRS/Financial Crimes Enforcement Network (FinCEN) Form 8300 in violation of 31 U.S.C. § 5331 and 31 U.S.C. § 5322(b) in Count Three and Count Four of the Indictment were similarly without cause or grounds, and therefore were vexatious, frivolous or in bad faith for the purposes of the Hyde Amendment. Doc. # 1, p. 4-5. Absolutely fatal to the Government's asserted Form 8300 charges was the fact that both the United States Supreme Court and the Eleventh Circuit have expressly recognized that § 5322's willfulness

requirement requires "'*both 'knowledge of the reporting requirement' and a 'specific intent to commit the crime,' i.e., 'a purpose to disobey the law.*'" *Ratzlaf v. United States*, 510 U.S. 135, 141, 114 S.Ct. 655 (1994) (emphasis added) (citing *United States v. Bank of New England, N.A.*, 821 F.2d 844, 854-859 (1st Cir. 1987); *United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984); *United States v. Granda*, 565 F.2d 922, 926 (5th Cir. 1978)). The Government itself implicitly recognized the groundlessness of its Form 8300 Counts by voluntarily dismissing Counts Three and Four at trial. It failed to present any evidence whatsoever at trial that Mr. Shelnutt allegedly knew of any reporting requirement or possessed any asserted purpose to disobey the law in failing to file any Form 8300.

In view of Mr. Shelnutt's lack of knowledge of the reporting requirement and intent to violate the law, any alleged failure to file a Form 8300 should have properly been treated as a matter for a civil proceeding or, more appropriately, a civil or administrative fine or penalty. These options were ignored by the Government in its zeal to convict Mr. Shelnutt. Other courts have found that the government's willful criminal prosecution of matters more appropriately resolved in a non-criminal manner to constitute grounds for an award of fees and costs under the Hyde Amendment. *See United States v. DeJong*, 26 Fed.Appx. 626, 628 (9th Cir. 2001) (unpublished) (affirming district court's grant of attorney fees under the Hyde Amendment where the defendant was acquitted on all counts of illegally discharging wastewater in violation of the Clean Water Act based on the government's failure to tie alleged discharges to the dates alleged in the indictment, observing that the defendant had "presented evidence at trial that a criminal proceeding was not the appropriate way to handle th[e] dispute..."); *United States v. Holland*, 34 F.Supp.2d 346, 364 (E.D.Va. Feb 03, 1999) (Opinion and Order), *opinion vacated in part on reconsideration by, United States v. Holland*, 48 F.Supp.2d 571 (E.D.Va. May 18, 1999), the district court (granting the defendant bank officers' motions for attorneys' fees and costs pursuant to the Hyde Amendment and awarding fees of $297,473.65 and litigation expenses and costs of $40,828.00, finding that the conduct of Federal Deposit Insurance Corporation in making a criminal referral and the conduct of the U.S. Attorney's Office for the Eastern District of Virginia in prosecuting the defendants in relating to seven loans was "vexatious," and noting that "evidence of civil wrongdoing

not criminal conduct"). This Court is therefore authorized to find that the Government's position on its Form 8300 charges was vexatious, frivolous or in bad faith for the purposes of determining whether Mr. Shelnutt should be awarded his reasonable attorney's fees and litigation expenses pursuant to the Hyde Amendment.

4. Attempted Bribery

The Government's charge, in Count Thirty-Six of its Indictment, of attempted bribery against Mr. Shelnutt in violation of 18 U.S.C. § 201(b) was also baseless, vexatious, frivolous and in bad faith, meriting an award under the Hyde Amendment. Doc. # 1, p. 9. The Government spuriously alleged that Mr. Shelnutt allegedly "corruptly" offered AUSA Hyde "University of Georgia football tickets" "with intent to induce him to do an act in violation of his official duty, that is, to influence his actions in the case of Torrance Hill." *Id.* The Government wholly ignored the Supreme Court's holding that, in order to convict a defendant for bribery, "some *particular* official act [must] be identified and proved." *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 405, 119 S.Ct. 1402 (1999) (emphasis added). Furthermore, a "legitimate and lawful alternative explanation" is a complete defense to a bribery charge. *See United States v. Opdahl*, 930 F.2d 1530, 1534 (11th Cir. 1991).

The evidence at trial conclusively established that Torrance Hill had already been sentenced at the time Mr. Shelnutt offered AUSA Hyde the tickets. Furthermore, several witnesses testified for the defense that Mr. Shelnutt had UGA season tickets and freely offered tickets to friends and colleagues. The Government presented no evidence at trial that Mr. Shelnutt ever asked AUSA to perform any official act in exchange for the tickets, or sought to "corruptly" influence AUSA Hyde in any manner. The Government's meritless, unsustainable attempted bribery charge against Mr. Shelnutt belies the vexatious, frivolous and bad faith nature of its prosecution of Mr. Shelnutt.[9]

[9] Unfortunately, the charge also reflects the heavy toll which the Government's investigation and prosecution took on Mr. Shelnutt and his relationships. Mr. Shelnutt had been an ADA with AUSA Hyde and considered him a friend, and had even represented AUSA Hyde's daughter.

5. Witness Tampering

Count Thirty-Seven, the alleged witness tampering, was also vexatious, frivolous or in bad faith. Doc. # 1, p. 13-14. Specifically, the Government alleged that Mr. Shelnutt, in violation of 18 U.S.C. § 1512(b), allegedly "did knowingly attempt to *intimidate* a person with the initials "J.S." by repeatedly telling J.S. that the financial transaction described in Count Five, was a "loan," when the defendant well knew that the transaction was not a loan..." *Id.* (emphasis added).

As Mr. Shelnutt has demonstrated, the money which he gave to Joanne Strickland was a loan made out of kindness to help pay for Ms. Strickland's daughter's wedding. Ms. Strickland expressly admitted that she never felt intimidated by Mr. Shelnutt. The vexatious, frivolous and bad faith nature of the charge is evidenced by the fact that the Government voluntarily dismissed the charge at trial.

6. False Statements

The Government charged Mr. Shelnutt in Counts Thirty-Eight through Forty of its Indictment with making alleged false statements in violation of 18 U.S.C. § 1001. Specifically, the Government asserted that Mr. Shelnutt allegedly falsely stated to Special Agent Kalish that Torrance Hill had not arranged for the payment of legal fees on behalf of others who had been charged with felony drug offenses (Count Thirty-Eight), that he had provided receipts to Tamika Hill for the total amount of currency Tamika Hill had brought to him (Count Thirty-Nine), and that Tamika Hill had provided him with a total amount of currency of $7,000.

The Government's false statement charges were baseless, vexatious, frivolous and in bad faith. The defense presented excerpts from the transcript of the long meeting between Special Agent Kalish, AUSA Ferguson and Mr. Shelnutt which showed that Mr. Shelnutt had to guess at the amount which Tamika Hill had paid him or whether he had given her a receipt, since it had been over three years earlier; that it was his habit to give a receipt.

"A violation of § 1001 requires proof that the defendant had the specific intent to make a false or fraudulent statement." *United States v. Lange*, 528 F.2d 1280, 1288 (5th Cir. 1976) (citing *United States v. Markee*, 425 F.2d 1043, 1046 (9th Cir. 1970)). "[T] he word 'false' as used in s 1001 must mean more

than simply incorrect or untrue. An intent to deceive or mislead is required under the act, e.g." *Id.*, at 1287 n. 10. Furthermore, as the Supreme Court has held, a false statement charge cannot be based upon a statement, however misleading or incomplete, which is the "literal truth." *Bronston v. United States*, 409 U.S. 352, 360 (1973); *United States v. Shotts*, 145 F.3d 1289, 1297 (11th Cir. 1998). *Bronston* "expressly places on the questioner the burden of pinning the witness down to the specific object of the inquiry." *United States v. Abrams*, 568 F.2d 411, 422 (5th Cir. 1978). In this case, Mr. Shelnutt's actual statements, taken in full context, were literally true, and could not be relied upon for any conclusion that Mr. Shelnutt intentionally misled Special Agent Kalish.

C. Attorney's Fees and Litigation Expenses Incurred

Mr. Shelnutt has submitted an Affidavit of John Mark Shelnutt setting forth the amount he has incurred as attorney's fees for the attorneys representing him in this matter, as well as the amount of costs and expenses he has incurred in this matter, along with supporting documentation. *See* Exhibit A. Mr. Shelnutt shows that the amount he has incurred in attorney's fees is approximately $190,400.10 and the amount of costs and expenses is approximately $35,085.79. *See id.*, ¶¶ 29, 30. Moreover, Mr. Shelnutt's trial counsel charged him a flat fee lower than counsel would have charged for a matter of comparable involvement and complexity, in order to aid a fellow member of the Bar.

The Hyde Amendment itself provides for the award of "a reasonable attorney's fee." 18 U.S.C. § 3006A, Note. Mr. Shelnutt recognizes that the EAJA provides, in relevant part, that "attorney fees shall not be awarded in excess of $125 per hour unless the 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.)." 28 U.S.C. § 2412(d)(2)(A)(ii); *accord Aisenberg*, 358 F.3d at 1341. Georgia District Courts have repeatedly approved the use of the Consumer Price Index ("CPI") for determining increases in the cost of living and corresponding adjustments to the attorney fees rate under the EAJA. *See Engebretson v. Astrue*, 2009 U.S. Dist. LEXIS 19792 (S.D. Ga. Mar. 12, 2009); *Usher v. Apfel*, 2000 U.S. Dist. LEXIS 16072 (M.D. Ga. 2000). Mr. Shelnutt submits that as of March 1996, when the EAJA was amended to increase the hourly rate for legal fees to $125/hour, the CPI was 152.4

for southern areas. As of March 2009, the CPI for southern regions has increased to 206.001. Applying this percentage of increase to the attorneys' fee rate yields an adjusted figure of $168.96/hour. Mr. Shelnutt and his counsel are willing to supplement any information required pursuant to the Hyde Amendment or the EAJA.

Mr. Shelnutt also recognizes that the same courts have generally limited an award of attorney's fees under the Hyde Amendment to the amount of the fee contract. However, Mr. Shelnutt respectfully submits that this Court may elect to award, as a reasonable attorney's fee, fees for the total hours expended by his counsel at his counsel's hourly rates.

> The purpose of the Hyde Amendment is not to encourage criminal litigation or ensure the availability of a criminal defense counsel, but to compensate criminal defendants for the amounts expended on their defense, to the extent reasonable, as well as to punish the Government for vexatious, frivolous, or bad-faith prosecutions.

Claro, 579 F.3d at 462. Mr. Shelnutt submits that such an award would serve the goal of compensation, and would serve as punishment and deterrence to the Government from initiating similar vexatious, frivolous and bad faith prosecutions in the future.

III. CONCLUSION

In its desire to convict Mr. Shelnutt at all costs, the Government cut Mephistophelean bargains with large-scale drug traffickers. The Government looked the other way as its witnesses made false statements against Mr. Shelnutt before the grand jury. Fortunately, Mr. Shelnutt prevailed against the threat to his liberty, but not against the threat to his reputation, career, financial well-being, family and relationships, which were damaged almost beyond repair. As another court has observed in another case under the Hyde Amendment, "[t]hese events are profoundly disturbing. They raise troubling issues about the integrity of those who wield enormous power over the people they prosecute." *United States v. Shaygan*, No. 08-20112-CR, 2009 WL 980289, *2 (S.D.Fla., April 09, 2009) (Order on Defendant's Motion for Sanctions Under Hyde Amendment).

The rule set down by the United States Supreme Court in another context is fitting in this case:

> 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 earnest 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.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629 (1935). The Eleventh Circuit has echoed these concerns, holding:

> "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); quoting *Handford v. United States*, 249 F.2d 295, 296 (5th Cir.1957)); citing *United States v. Goodwin*, 492 F.2d 1141, 1147 (5th Cir. 1974)).

The Government has willfully struck many a foul blow, and has used improper methods to attempt to produce a wrongful conviction. As this Court has observed, "appropriate prosecutorial discretion should have caused the Government to decline to prosecute this case." *United States v. Morris*, 248 F.Supp.2d 1200, 1206 (M.D.Ga. 2003) (Order). The Government did not employ discretion in this case. Instead it prosecuted Mr. Shelnutt based upon positions which were wholly vexatious, frivolous or in bad faith. Mr. Shelnutt is entitled to an award of reasonable attorney's fees and expenses of litigation under the Hyde Amendment.

Respectfully submitted, this 15th day of December, 2009.

s/ Thomas A. Withers, Esq.
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CERTIFICATE OF SERVICE

The undersigned certifies that I have on this day served all the parties in this case in accordance with the notice of electronic filing ("NEF") that was generated as a result of electronic filing in this court.

This 15th day of December, 2009.

s/ Thomas A. Withers, Esq.
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA *

vs. *

CASE NO. 4:09-CR-14 (CDL)

JOHN MARK SHELNUTT, *

Defendant. *

O R D E R

Defendant has filed a motion seeking reconsideration of the Court's Order denying Defendant's Motion for Attorney's Fees. Defendant maintains that consideration of the trial transcript and other documents produced during discovery in the underlying criminal case leads to the inescapable conclusion that the Government's prosecution of him was frivolous, vexatious, and in bad faith. Therefore, Defendant insists that ample evidence exists supporting his claim 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 the Court should reconsider its previous ruling to the contrary. For the following reasons, Defendant's Motion for Reconsideration (Doc. 143) is denied.

The undersigned presided over Defendant's trial and does not need a transcript of those proceedings to determine whether Defendant has satisfied his burden for the recovery of attorney's fees. When the Court previously denied Defendant's motion, it considered all of the evidence available to it at the time of its decision, including

the evidence presented at the trial. Reviewing a written transcript of those proceedings, which proceedings were obviously considered by the Court in its previous ruling denying Defendant's motion, would not change the Court's conclusion. Accordingly, Defendant's request that the Court reconsider its previous decision based upon a review of the trial transcript is denied.

Defendant also seeks to submit additional evidence that apparently is not part of the trial transcript or present record. The time has passed for Defendant to have submitted evidence in support of his claim for attorney's fees. A motion for reconsideration cannot be used to "relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Vill. of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005). Defendant had capable counsel who made a valiant effort to recover Defendant's attorney's fees. The evidence that Defendant now seeks to have the Court consider was available to them when they filed his previous motion for attorney's fees. To the extent that this evidence was previously submitted in support of, or in opposition to, Defendant's earlier motion, the Court considered it. To the extent that it was available but not submitted, it cannot now be considered on a motion for reconsideration. *See Mays v. U.S. Postal Serv.*, 122 F.3d 43, 46 (11th Cir. 1997) (per curiam) ("[W]here a party attempts to introduce

previously unsubmitted evidence on a motion to reconsider, the court should not grant the motion absent some showing that the evidence was not available during the pendency of the motion."); *accord Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1293 (11th Cir. 2001). Accordingly, Defendant's request to supplement the record with new evidence is denied.

The Court understands Defendant's frustration. Defendant, an innocent man, faces financial hardship because of the Government's unsuccessful prosecution of him. Even the slightest empathy produces a sense of unfairness; but subjective fairness cannot guide the Court. This Court must remain anchored by the law as enacted by Congress. It is duty bound to follow that law even if the consequences are harsh. That law is clear. Congress has decided that, except in a rare case of prosecutorial misconduct, a citizen must bear the legal cost of an acquittal. The narrow exception to this principle, carefully carved out by Congress, allows a defendant to recover his costs of a successful defense only if he proves that the Government's prosecution was frivolous, vexatious, or in bad faith. *See United States v. Morris*, 248 F. Supp. 2d 1200, 1204-05 (M.D. Ga. 2003) (explaining Hyde Amendment's legislative history). A defendant's burden is substantial, having been described by the Eleventh Circuit as "a daunting obstacle." *See United States v. Gilbert*, 198 F.3d 1293, 1302-03 (11th Cir. 1999) ("The [Hyde

Amendment's] plain language, reinforced by its legislative history . . ., places a daunting obstacle before defendants who seek to obtain attorney fees and costs from the government following a successful defense of criminal charges."). The Court previously found that Defendant had not carried this substantial burden and thus denied Defendant's Motion for Attorney's Fees. Neither the transcript of the trial nor any other evidence that was available to the Court at the time it denied Defendant's motion will change this conclusion, and thus the Court has no legitimate choice but to deny Defendant's motion.

For all of these reasons, Defendant's Motion for Reconsideration (Doc. 143) is denied.[1]

IT IS SO ORDERED, this 19th day of March, 2010.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA, *

vs. *

CASE NO. 4:08-CR-08-002 (CDL)

SHAWN BUNKLEY, a/k/a Biscuit, *

Defendant. *

*

ORDER

Defendant pled guilty to a superseding information that charged him with conspiring to possess with intent to distribute more than 500 grams of cocaine. The United States Attorney's Office for the Middle District of Georgia stipulated in its non-binding plea agreement with Defendant that Defendant should be held accountable for between 500 grams and two kilograms of cocaine for sentencing purposes. At the sentencing hearing, the Court found that Defendant was responsible for 138 kilograms of cocaine and sentenced Defendant to 110 months imprisonment, which sentence substantially exceeded the advisory guideline range calculated in the presentence report. The Court explained on the record the rationale for its variance sentence. Because of this substantial variance, the presence of several unique legal issues involved in this sentencing, and the fact that no party in this case will likely file a brief in support of the Court's sentence on appeal, the Court finds it appropriate to issue

this written Order explaining its rationale for the sentence in this case.[1]

THE ADVISORY GUIDELINE RANGE

The presentence report calculated Defendant's advisory guideline range to be 37-46 months based upon an offense level of 21 and criminal history category of I. The offense level, which drove the guideline range calculation, was based upon a stipulation by the Government in its non-binding plea agreement with Defendant that the amount of drugs that Defendant should be held accountable for was between 500 grams and two kilograms.

The Court found that the presentence report accurately calculated the advisory guideline range *based upon the stipulated drug amount*; however, the Court was concerned that the amount of drugs directly attributable to Defendant and all reasonably foreseeable quantities of drugs that were within the scope of the criminal activity that Defendant jointly undertook, substantially exceeded the stipulated amount. The Court finds it useful to provide

[1]The Court believes it adequately explained its rationale on the record at the sentencing hearing. However, the Court's oral explanation may not have been as thorough and as organized as this written Order, which will hopefully assist the court of appeals in making an informed decision on any appeal. This Order may be particularly helpful in this case where the U.S. Attorney's Office will be unable to file a brief in support of the sentence. Since the U.S. Attorney's Office stipulated to a drug amount in its plea agreement with Defendant, it is bound to honor that stipulation. It would be a breach of the plea agreement for the U.S. Attorney's Office to make any argument contrary to the stipulation, and thus, the U.S. Attorney's Office cannot support the Court's sentence in this case.

some background that explains the Court's skepticism as to the amount of drugs to which the Government had willingly stipulated.

BACKGROUND

The Court was well familiar with the drug conspiracy from which Defendant's charges arose. The drug bust that led to these charges was touted by the U.S. Attorney's Office and law enforcement as the biggest drug bust in the history of Columbus. Melanie Bennett, *Record Bust Drug and Money Seizures: Officials Say Group Supplied Drugs to Six Counties in Columbus Area*, Columbus Ledger-Enquirer, May 6, 2005, at A1. Numerous indictments were obtained that had some connection to the bust, and the Court was familiar with many of the players having previously taken guilty pleas from and sentenced some of them. The bust also produced a high-profile indictment of a prominent local attorney, Mark Shelnutt, who represented the purported leader of the drug conspiracy. *See United States v. John Mark Shelnutt*, Case No. 4:09-CR-14.

The alleged leader of the drug conspiracy in which Defendant was involved was Torrance Hill, who the Court had previously sentenced to 294 months based on a finding that he was responsible for 316 kilograms of cocaine, 154 grams of cocaine base, and 848 kilograms of marijuana. *See United States v. Torrance Hill*, Case No. 4:05-CR-26. The Court had also sentenced one of Hill's lieutenants, who played a role in the conspiracy similar to Defendant, to 120 months based upon

a stipulated drug quantity of forty-three kilograms of cocaine. *See United States v. Cortez Johnson*, Case No. 4:08-CR-45.

The Court was also aware of the U.S. Attorney's Office's aggressive pursuit of Hill's attorney, Shelnutt, on money laundering and drug conspiracy charges, and its attempt to turn Hill, Defendant, and other co-conspirators in the Hill drug operation against Shelnutt by obtaining their cooperation against him. The Court was particularly struck by the zeal with which the U.S. Attorney's Office pursued Shelnutt and the Court became concerned when it learned of information suggesting that the U.S. Attorney's Office had crossed the line from independent prosecutor to law enforcement. At a hearing on a motion to dismiss the indictment against Shelnutt based on alleged prosecutorial misconduct, the Assistant U.S. Attorney who was in charge of the present Bunkley case admitted that he had attempted to surreptitiously tape an interview with Shelnutt, and when Shelnutt asked him whether the interview was being taped, the Assistant U.S. Attorney informed him that it was not, which was untrue. The Assistant U.S. Attorney acknowledged at the hearing that he should not have been dishonest about the taping, but that he thought at the time that his approach had been approved in advance by his supervisor, and thus was appropriate. In light of the U.S. Attorney's Office's relentless pursuit of Shelnutt, the Court became concerned that the U.S. Attorney may have made deals with various co-

conspirators to gain their cooperation against Shelnutt, rather than based upon their own actual criminal conduct.[2]

Defendant's deal was not the only sweetheart deal in the various cases arising from this massive conspiracy. The U.S. Attorney's Office also agreed to let two other significant co-conspirators off with nothing more than pretrial diversion. *See United States v. Latea Davis,* Case No. 4:08-CR-08-001; *United States v. Choici Lawrence,* 4:08-CR-08-007. In addition, the Government entered into a plea agreement with another major player in the conspiracy which resulted in a stipulated drug amount of 200-300 grams of cocaine when evidence existed that the defendant in that case arguably was responsible for multiple kilograms of cocaine. *See United States v. Santwan Holt,* Case No. 4:08-CR-08-005.

With this background, the Court became concerned that the focus of the U.S. Attorney's Office was on getting a high-profile lawyer and negotiating sweetheart plea deals with the actual drug dealers to accomplish that. The U.S. Attorney's Office maintains that it made the various deals with the other co-conspirators, including Defendant, because of a lack of evidence tying them to the larger drug

[2]The Shelnutt case was officially prosecuted by Assistant U.S. Attorneys from the Southern District of Georgia due to a conflict of interest involving the Middle District U.S. Attorney's Office. Nevertheless, it was apparent that the Middle District U.S. Attorney's Office was involved to some degree in the investigation, as evidenced by the surreptitious taping of Shelnutt and its continued representation of the Government in the cases against the various co-conspirators who testified against Shelnutt pursuant to cooperation agreements negotiated by the Middle District U.S. Attorney's Office.

conspiracy. They claim that the only evidence they had would have been testimony from other members of the conspiracy, the credibility of which could be attacked at trial. Yet, that is the same type of evidence that the Government relied upon to indict Shelnutt and take his case to trial. Thus, the Court found the U.S. Attorney's rationale unpersuasive.

Based on the foregoing, the Court had concerns that the judgment of the U.S. Attorney's Office may have become clouded by its zeal to bring down a prominent criminal defense attorney. Thus, the Court determined that the stipulated drug amount in Defendant's plea agreement should be closely scrutinized. Consequently, rather than blindly accept the Government's plea agreement with Defendant, including the stipulated drug amount, the Court continued the first sentencing hearing and informed Defendant and the Government that the Court intended to summons witnesses to the next hearing to make an independent determination as to the amount of drugs for which Defendant should be held accountable. (*See* Tr. 12:11-13:4, 13:24-14:5, Oct. 21, 2009 (Doc. 300) ("10/21 Tr.").) In the meantime, the Court tried the case of Hill's attorney, at which the Court learned of additional information that confirmed its skepticism as to the agreement the U.S. Attorney had reached with Defendant regarding his involvement in the drug conspiracy.[3]

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[3]The Court derives no satisfaction in its criticism of the U.S. Attorney's Office. It has found the Assistant U.S. Attorneys who regularly practice in this Court to be competent professionals. The Court also does

THE MARK SHELNUTT TRIAL

Prior to Defendant's sentencing, the Court tried the case of *United States v. Mark Shelnutt*, Case No. 4:09-CR-14. In that case, the Government indicted Shelnutt, a local attorney, in a forty-count indictment alleging offenses ranging from money laundering to drug conspiracy. Shelnutt had represented Torrance Hill, and the Government alleged that Shelnutt assisted Hill with laundering proceeds from his drug operation. At trial, Bunkley testified on behalf of the Government that he had delivered large amounts of cash to Shelnutt on behalf of Hill. As part of his trial testimony, Bunkley testified that his own involvement in the drug operation was substantial. Construing his testimony conservatively, Bunkley admitted responsibility for at least 138 kilograms of cocaine, far in

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not seek to publicly embarrass any of these public servants, and therefore, the Court does not name them in this Order. Moreover, the Court notes that the Assistant U.S. Attorney stationed in the Columbus Division did not represent the Government in the Shelnutt case or the present case, and thus none of the Court's comments in this Order are directed at him. Notwithstanding the Court's reluctance to criticize the Government's attorneys who did handle these cases, the Court finds it important to make these observations regarding its perception of their performance as it relates to the context in which this Court made its sentencing decisions in this case. The Court also points out that it did not perceive the Assistant U.S. Attorney who was on the front lines in the present case as a rogue assistant making these significant decisions on his own, but instead as an inexperienced front line soldier following orders from his experienced supervisors who were approving these decisions. (*See* 10/21 Tr. 8:6-8 (stating that "all of these plea agreements were obviously approved by [the Assistant U.S. Attorney's] management as well"); *see also id.* at 11:4-5 (stating that plea agreement consideration "went to the highest levels of management within [the U.S. Attorney's] office").)

excess of the paltry two kilograms to which the Government had stipulated.[4]

At trial, the Government dismissed three of its counts against Shelnutt and the jury acquitted Shelnutt on the rest. Thus, the Government lost its high-profile conviction. Perhaps more disturbing to the Court, however, was the fact that in the process, the Government had stipulated to certain relevant conduct by Bunkley, which if agreed to by the Court, would result in a major participant in one of the City's largest drug conspiracies escaping with a modest sentence of between thirty-seven and forty-six months.[5] The Court subsequently informed Bunkley that it intended to consider his trial testimony in determining his relevant conduct for sentencing purposes and for whether a variance was appropriate. (Order, Nov. 19, 2009 (Doc. 307).)

DECEMBER 10, 2009 SENTENCING HEARING

At the sentencing hearing, the Court called one of the case agents who was primarily responsible for investigating the Hill drug operation and who was familiar with Defendant's participation in it. Agent Jonathan Memmo testified that Defendant's involvement during the

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[4]Bunkley's testimony from the Shelnutt trial was admitted as Exhibit 1 at his December 10, 2009 sentencing hearing. (*See* Ex. 1 to Dec. 10, 2009 Sentencing Hr'g, Bunkley Tr., Nov. 11, 2009 (Ex. 1 to Doc. 310) ["11/11 Bunkley Tr."].)

[5]The U.S. Attorney, in fact, sought a downward departure for Bunkley based on his substantial assistance. Thus, from the perspective of the U.S. Attorney, a sentence of less than thirty-seven months would have been appropriate, which the Court finds astonishing.

period alleged in his indictment far exceeded the 500 grams to two kilograms that the Government had stipulated to in its plea agreement with Defendant. He explained that two of the co-conspirators in the case had provided specific information that Defendant was responsible for a minimum of 138 kilograms of cocaine. Agent Memmo testified that based on his familiarity with the investigation and the conspiracy, he was convinced that Defendant was involved at least to this extent. Agent Memmo based his testimony on information that was independent from any information obtained from Defendant subsequent to Defendant's cooperation agreement with the Government. His evaluation of Defendant's relevant conduct did not come from Defendant but from independent sources, two fellow co-conspirators.

The Court provided Defendant's counsel with an opportunity to object to the Court's consideration of an upward variance. Defendant's counsel objected to the testimony of Agent Memmo, contending that it was not credible because it was based upon information from two informants who had something to gain from their cooperation. The Court rejected this argument and found Agent Memmo's testimony credible. Defendant also objected to the Court using the trial testimony of Defendant, which Defendant claims would violate U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 1B1.8's prohibition against using information obtained pursuant to a cooperation agreement in the determination of the guideline range. Although not necessary to the Court's sentencing ruling, the Court likewise rejected this

objection as explained more fully below. Accordingly, the Court sentenced Defendant to a variance sentence outside of the advisory guideline range.

THE UPWARD VARIANCE AND SENTENCE

The Court found that Defendant's own trial testimony and the testimony of Agent Memmo independently established that Defendant should be held accountable for at least 138 kilograms of cocaine.[6] Rather than make a *de novo* finding as to relevant conduct different from the stipulated conduct in the presentence report or make an upward departure using the guidelines, the Court found it more appropriate to evaluate an upward variance. The Court recognized that § 1B1.8 would not permit it to use Defendant's own testimony, which was given pursuant to a cooperation agreement with the Government, in determining the guideline range. Thus, the Court accepted the advisory guideline range calculation as accurate given the constraints of § 1B1.8. However, as explained more fully in the remainder of this Order, the Court concluded that § 1B1.8 only applied to a *determination of the guideline range* and did not apply to a *variance* from that range. Moreover, even if the Court could not consider Defendant's own testimony in determining his relevant conduct, the testimony of Agent Memmo independently supported the Court's findings and sentence.

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[6]This estimate is conservative. At one point during the Shelnutt trial, Bunkley admitted to dealing in 200 kilograms of cocaine. (*See* 11/11 Bunkley Tr. 55:5-8.)

In determining the extent of the variance, the Court first calculated what Defendant's advisory guideline range would have been had the Government not stipulated as to the amount of drugs and had Defendant been held accountable for the amount that the Court found the evidence supported—at least 138 kilograms. Based on that amount, his guideline range would have been 108 to 135 months considering an offense level 31 and a criminal history category I.[7] The Court further took into consideration that Defendant did provide some assistance for which he should have gotten some credit, and therefore, the Court found that he should be sentenced near the lower end of the variance range. Based on the foregoing and the statutory factors to be considered, as enumerated in 18 U.S.C. § 3553(a), the Court sentenced Defendant to 110 months.

LEGAL ISSUES

Preliminarily, the Court found that its variance sentence was completely supported by the testimony of Agent Memmo. The Court found his testimony credible and that it accurately reflected Defendant's relevant conduct. Since that testimony was based on information from sources that were independent from Defendant's own trial testimony, it should support Defendant's sentence even if it is found that the Court cannot rely upon Defendant's own testimony. *See United States*

[7]The variance offense level calculation is based on the following: base offense level of 36 based on 50-150 kilograms of cocaine, U.S.S.G. § 2D1.1(a)(5) (citing U.S.S.G. § 2D1.1(c)(2)); reduced two levels by safety valve, U.S.S.G. § 2D1.1(b)(11); reduced three levels for acceptance of responsibility, U.S.S.G. § 3E1.1(b).

v. Pham, 463 F.3d 1239, 1244 (11th Cir. 2006) (per curiam) ("[S]o long as the information is obtained from independent sources or separately gleaned from codefendants, it may be used at sentencing without violating § 1B1.8.").

Although not necessary to uphold the Court's sentence, the Court does find that Defendant's own testimony corroborates Agent Memmo's testimony as to Defendant's true relevant conduct. Using Defendant's testimony to support the sentence, however, does present an issue of first impression in this Circuit: When a defendant enters into a non-binding plea agreement with the Government, which includes a stipulation by the Government as to the amount of drugs for which the defendant should be held accountable and also includes a cooperation agreement whereby the Government agrees, pursuant to § 1B1.8, not to use any self-incriminating information obtained during the cooperation against the defendant for purposes of determining his guideline range, is the Court prohibited from *sua sponte* taking into consideration the defendant's subsequent trial testimony as to the drug amount in deciding whether a variance sentence should be imposed when that trial testimony substantially conflicts with the stipulated drug amount in the plea agreement and when that trial testimony is corroborated by other independent testimony from a law enforcement officer familiar with the nature and extent of the relevant conduct?

It is clear that the Court did not have to accept the stipulation of drug amount contained in Defendant's plea agreement with the

Government. (*See* Shawn Bunkley Plea Agreement 3-4, 7, July 23, 2009 (Doc. 263) ("Plea Agreement").) The plea agreement was not binding on the Court, and Defendant was so informed both in the written plea agreement (*see id.*) and in the Court's colloquy when Defendant entered his plea (Tr. 15:10-14, July 23, 2009 (Doc. 280)). Moreover, Defendant was specifically informed that the Court's refusal to accept recommendations in his plea agreement would not provide Defendant with the right to withdraw his guilty plea. (*Id.* at 15:20-16:2.) Thus, Defendant cannot complain that the Court's refusal to accept the stipulated drug amount violated any of his constitutional or contractual rights. The Court also notes that the Government opposes the upward variance and thus it has not breached its plea agreement with Defendant.

The next question is whether it is appropriate for the Court to use Defendant's own testimony as the basis for its findings regarding his true relevant conduct. The plea agreement provided in relevant part as follows:

> If Defendant cooperates truthfully and completely with the Government, including being debriefed and providing truthful testimony, at any proceeding resulting from or related to Defendant's cooperation, the United States Attorney will make the extent of Defendant's cooperation known to the sentencing court. . . . If the cooperation is completed prior to sentencing, the Government agrees to consider whether such cooperation qualifies as "substantial assistance" . . . warranting the filing of a motion . . . recommending a downward departure from the applicable guideline range.

(Plea Agreement 5-6.) The plea agreement also provides:

> Pursuant to Section 1B1.8 of the United States Sentencing Guidelines, the Government agrees that any self-incriminating information which was previously unknown to the Government and is provided to the Government by Defendant in connection with Defendant's cooperation and as a result of Defendant's plea agreement to cooperate will not be used in *determining the applicable guideline range*. Further, the Government agrees not to bring additional charges against Defendant . . . based on any information provided by Defendant in connection with Defendant's cooperation[.][Emphasis added by the Court.]

(*Id.* at 6-7.) Neither the plea agreement nor § 1B1.8 addresses whether Defendant's self-incriminating testimony may be used in determining a *variance* to the advisory guideline range. The guideline and plea agreement specifically refer *only* to "determining the applicable *guideline range*" not a *variance from it*. U.S.S.G. § 1B1.8 (emphasis added). At least one circuit has held, however, that a sentence is *per se* unreasonable if the sentencing judge relies upon information provided by the defendant as part of his cooperation agreement. *See United States v. Milan*, 398 F.3d 445, 455-57 (6th Cir. 2005) ("[A] sentence based on facts found through a violation of § 1B1.8 would be unreasonable."). This approach assures a cooperating defendant of limited use immunity for any information he supplies pursuant to his cooperation. The problem with this approach is that it expands § 1B1.8 beyond its plain and unambiguous language which restricts its application to a guideline range determination. Moreover, this broad interpretation has the effect of making this single guideline mandatory rather than advisory, which is arguably inconsistent with *United States v. Booker*, 543 U.S. 220 (2005), and

its progeny. With all due respect to the Sixth Circuit, the Court finds that since the plea agreement in this case is not binding on the Court and since advisory guideline § 1B1.8 does not apply to a variance, neither the agreement nor the guideline automatically restrict the Court's discretion in imposing an upward variance based upon Defendant's subsequent trial testimony, unless by doing so the Court violates Defendant's Fifth Amendment right against self-incrimination.

The Court finds that because Defendant was not compelled to provide the testimony upon which the Court relied and because Defendant did not assert his Fifth Amendment right prior to providing the testimony, no constitutional violation occurred. The Fifth Amendment protection against self-incrimination is not self-executing. *United States v. Vangates*, 287 F.3d 1315, 1320 (11th Cir. 2002). "Rather, as a general rule, to be protected a witness must assert that right specifically. Thus, a witness's answers 'are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of privilege.'" *Id.* (quoting *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984)). Furthermore, "'if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself.'" *Murphy*, 465 U.S. at 427 (quoting *Garner v. United States*, 424 U.S. 648, 654 (1976)).

For purposes of sentencing in this case, the Court assumed that Defendant was compelled to testify at the trial of *United States v. Shelnutt* pursuant to his plea agreement because if he did not do so, the Government would have been justified in not filing a 5K motion for reduction of his sentence based on substantial assistance. Thus, Defendant had an obligation to testify truthfully at the trial. However, this does not mean that he had an obligation to answer every question that was propounded to him. The Court finds that it was not objectively reasonable for Defendant to conclude that if he refused to answer questions that had the potential to contradict the stipulated drug amount in the plea agreement that he would have lost the benefit of the cooperation provisions of his plea agreement. While he could not have lied, he could have sought to invoke his Fifth Amendment right against self-incrimination and simply refused to testify as to the exact amount of cocaine that he participated in conspiring to distribute. *See Murphy*, 465 U.S. at 427-29, 434-39 (concluding that since probationer was not informed that assertion of the privilege against self-incrimination would result in imposition of a penalty, and in light of Supreme Court decisions proscribing threats of penalties for the exercise of Fifth Amendment rights, probationer could not reasonably have feared that the assertion of the privilege would have led to revocation). The Court finds that Defendant was not placed in a position such that he had a reasonable belief that if he refused to answer every question posed to him, he

would lose the benefit of his cooperation agreement with the Government. Instead, the Court finds that Defendant had the free choice to invoke his Fifth Amendment rights, and his failure to do so means that his testimony, and subsequent consideration of it by the Court, does not violate his constitutional right against self-incrimination.[8] Accordingly, the Court finds that reliance upon Defendant's trial testimony in determining the drug amount for purposes of a variance sentence does not violate Defendant's Fifth Amendment rights; but, even if it does, the sentence in this case is fully supported by the independent testimony of Agent Memmo.

CONCLUSION

For all of these reasons and the reasons stated at Defendant's sentencing hearing, the Court determines that a sentence of 110 months is consistent with and required by the sentencing considerations enumerated in 18 U.S.C. § 3553. It takes into consideration the true nature and circumstances of the offense and the history and characteristics of Defendant. It reflects the actual serious nature of the illegal conduct in which Defendant was engaged and promotes respect for the law. In addition, it provides a just punishment for

[8]The Court notes that Defendant should not have been surprised that these questions may be asked at trial nor that any responses he gave would be of interest to the Court for purposes of his sentencing. Prior to his trial testimony, Defendant, who was represented by counsel, was notified that the Court was concerned about the amount of drugs that he should be held accountable for and that the Court intended to explore additional evidence at the sentencing hearing. (*See* 10/21 Tr. 12:11-13:4, 13:24-14:5.) Thus, before Defendant gave his trial testimony, he was on notice of the Court's skepticism as to the Government's stipulation regarding the drug amount.

the offense, particularly in light of the sentences given others similarly situated to Defendant. The sentence should also afford adequate deterrence for this Defendant in the future and for others who may contemplate engaging in similar unlawful conduct. Finally, the sentence will protect the public for a reasonable period of time from further crimes of this Defendant.

The Court recognizes that its sentence in this case may also have some negative consequences. It could send a message that defendants now have less assurance in this Court that the Government's sentencing recommendations will be followed, and that it is possible that information defendants provide pursuant to a cooperation agreement may be used to their detriment instead of their benefit. The Court acknowledges that this could result in fewer defendants being willing to cooperate against other defendants, thus presenting extra challenges for the Government in future cases.

While the Court does not discount these concerns altogether, the Court finds that they pale in significance to the alternative: to allow a significant drug dealer, who was a major player in one of the largest drug conspiracies in the City's history, to return to the streets after serving a sentence that is typically given to the most modest street-level dealer. Such a sentence would not be consistent with the nature and consequences of the offense; nor would it reflect the seriousness and breadth of Defendant's illegal activities. While such a sentence may promote a respect for Government deal-making with

cooperating defendants, it would likely diminish the average citizen's respect for the law. It would allow a convicted defendant to escape a just punishment and, because of the lenient sentence, would likely not deter him or others similarly situated from future criminal conduct. Such a lenient sentence would certainly not protect the public to the same degree that the Court's sentence will.

Congress has determined that an appropriate statutory sentencing range for this crime is five to forty years. *See* 21 U.S.C. § 841(a)(1), (b)(1)(B). The sentencing guidelines advise that a defendant involved in criminal activity to the extent that Defendant has admitted, which activity has also been independently corroborated, should spend between 108 and 135 months in prison. Based on the foregoing, the Court humbly submits that its sentence of 110 months is eminently reasonable, necessary, and authorized under the law.

IT IS SO ORDERED, this 14th day of December, 2009.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE