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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.

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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 ofretaliation 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;

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1. 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
2. attempted to manipulate the trial testimony of Courtney Tucker, a government witness, by twisting her words during pretrial interviews.

# ll. FACTUALBACKGROUND

1. **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 representeddefendantEvelio 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.

# 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.

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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).

# Attempted Deception of the Defense-The *Brady* Motion

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

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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).

# 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.

# The Malicious Invasion of the Defense Camp

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

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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

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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

,iir 1, 12-13; Exhibit B at **,i,i** 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 **,i** 1. According to Agent Wells, Tucker first made this allegation on Friday, November 21, 2008, Exhibit A at **,i** 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

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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 **,i,i** 2-3. AUSA Karen Gilbert was to be the "point of contact." Exhibit A at **,i** 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.

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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 ,i 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 iJ 5; Exhibit Bat iii! 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 **,ii[** 8-9. Agent Wells claims he informed AU SA 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 iJ6.

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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

,r 11. Agent Wells claims that he first learned about Clendening's second recorded

conversation with attorney Markus on February 19, 2009. Exhibit A at **,r** 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 **,r,r** 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 ,r 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.

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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.*

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VENTO, nor the substance of any recording. Nor at the time was I aware of the substance of the recording.

* 1. That same date, I advised GILBERT that VENTO had made a recor9ing. GILBERT advised me not to discuss the substance of any meeting or recording with other agents or members of the trial team.
	2. On December 10, 2008, I traveled to West Palm Beach and collected the digital recorder provided to VENTO. Prior to obtaining the recording device, I was unaware of the contents of the recording.
	3. That same date, I transported the recording device to the United States Attorney's Office in Miami and met with GILBERT. On that recording, GRAFF, investigator for the defense team, explained that he had been attempting to contact VENTO via telephone and had made multiple visits to VENTO's listed home address. In addition, GRAFF stated that contacting VENTO had been a priority of the SHAYGAN defense team for the past two months. At the conclusion of the conversation, GRAFF advised VENTO that SHAYGAN's attorneys would like to meet with him face-to-face as soon as possible. After reviewing this tape, the contents were never disclosed to AUSA's CRONIN or Andrea HOFFMAN. The recorder was not reissued to VENTO,
	4. On or about December 21, 2008, I received a voicemail from CLENDENING. CLENDENING's voicemail indicated that he attempted to record a conversation with a member of the defense team; he further indicated that the recording device "came unplugged" and he only captured a "small piece" of the conversation.
	5. On or about December 29, 2008, I contacted CLENDENING via telephone and confirmed the substance of his voicemail in that he attempted to record a conversation with a member of the defense team but the recording device came "unplugged." He again mentioned that he only recorded a small portion of the conversation. During this conversation he confirmed that the conversation was not recorded, but he indicated that the conversation regarded setting a face-to-face meeting. Based upon the aforementioned recording malfunction and the indicated lack of content, the recording was not requested from, nor provided by, GLENDENING. The contents of my conversation with CLENDENING were not discussed with either AUSA CRONIN or HOFFMAN.
	6. On or about January 5, 2009, after returning to Florida from annual lyave, I was notified by the Assistant Special Agent In Charge, DEA Miami Field Division, that the potential witness tampering inquiry was being assigned to a senior special agent within a separate DEA group. At that point, other than debriefing the newly assigned DEA agent, I was instructed not to participate in any future efforts of the DEA inquiry.
	7. On or about January 8, 2009, I met with Senior Special Agent Jim Brown and advised him of the witness tampering inquiry that was being conducted as a result of the information relayed by TUCKER. Moreover, I advised BROWN about the recording

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obtained by VENTO; the malfunction of the recording attempted by CLENDENING. I also gave BROWN all known contact information for potential witnesses. At no time during my involvement in this inquiry were other recordings made by VENTO, nor were face-to-face meetings setup between the witnesses and the defense team. I was not made aware of the second recording made by CLENDENING-utilizing his own recording equipment-until Thursday, February 19, 2009, during his cross-examination by the defense team.

# FURTHER AFFIANT SAYETH NAUGHT

**-LS,**

SPECIAL AGENT

DRUG ENFORCEMENT ADMINISTRATION

Subscribed and sworn to before me

this th day ofFEBRUA 2009

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EXPIRES: December 7, 2010

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**SANDRA B. ORTIZ**

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