UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**93-0187-CR-FERGUSON (S)**
	)	
v.	)	
	)	
XXXX XXXX,)		
	)	
Defendant.	)	
_____	)	

MEMORANDUM IN SUPPORT OF DEFENDANT S MOTION FOR REIMBURSEMENT OF ATTORNEYS FEES AND LITIGATION EXPENSES PURSUANT TO 18 U.S.C/3006A (THE HYDE AMENDMENT)

F. Clinton Broden
Tx. Bar 24001495
Mick Mickelsen
Tx. Bar 140011020
Broden & Mickelsen
4924 Greenville Avenue
Dallas, TX 75206
(214) 360-0113
(214) 360-9327 (facsimile)

LOCAL COUNSEL

Howard J. Schumacher
Fl. Bar 776335
One East Broward Boulevard, Suite 700
Ft. Lauderdale, FL 33301
(954) 356-0477

Attorneys for Defendant
XXXX XXXX

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I. INTRODUCTION

As recognized by Congressman Hyde prior to the passage of the Hyde Amendment, [t]he Constitution protects you, but it will not pay your bills. That Constitution you carry in your pocket, the landlord will not take that and your lawyer will not take that. They want to get paid with cash. 143 Cong. Rec. H 7786-04, H7793 (Sept. 24, 1997).

XXXX XXXX was arrested on April 8, 1993 based upon the words of Helmut Groube and Harry Pfeil. More than seven years later, on July 20, 2000, this Court dismissed the case against Mr. XXXX after the government refused to even produce Groube and Pfeil as witnesses in its prosecution of Mr. XXXX. Finally, on or about July 28, 2000, after clearing various INS hurdles, Mr. XXXX walked out of the Miami Federal Detention Center with the clothes on his back. Nevertheless, during the seven years, three months and twenty days of his incarceration, Mr. XXXX was ruined financially. Indeed, in order to win his freedom Mr. XXXX estimates that he spent approximately $180,725.75 in attorneys fees and $204,570.34 in related litigation expenses. *See* Attachment 1.[1]

In its July 21, 2000 order dismissing the case, this Court found that the government realized **five months after the first trial in this matter**, in other words by July 1994, that it had been exploited by [Groube and Pfeil]. *See* Order Dismissing Indictment (July 21, 2000) (emphasis added). In short, this Court has found as a matter of fact that the government knew **six years** prior to the second trial that its continued prosecution of Mr. XXXX was not viable. This Court s findings in its dismissal order compel, at the very least, the reimbursement of Mr. XXXX s attorneys fees and related litigation expenses incurred after July 1994. Nevertheless, as set forth below, Mr. XXXX submits that the government should have known from the initial stages of this case that its prosecution against him was not viable and, as a result, submits that he is entitled to reimbursement of *all* his attorneys fees and related litigation expenses.

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[1] In reality, Mr. XXXX spent additional monies on attorney fees and litigation expenses, however, he no longer recalls the additional amounts spent.

II. THE HYDE AMENDMENT

As this Court knows, the Hyde Amendment is codified as a note to 18 U.S.C. ⁄ 3006A and provides for the reimbursement of attorney s fees and litigation expenses incurred by criminal defendants in certain circumstances. The history of the Hyde Amendment was discussed at length by the United States Court of Appeals for the Eleventh Circuit in *United States v. Gilbert*, 198 F.3d 1293 (11th Cir. 1999) and will not be repeated herein except where necessary. Nevertheless, for purposes of the instant motion, it is very instructive to understand the type of governmental conduct that the Amendment s author believed would support the reimbursement of a defendant s attorney s fees and litigation expenses.

> Now, it occurred to me, if that is good for a civil suit, why not for a criminal suit. What if Uncle Sam sues you, charges you with a criminal violation, even gets an indictment and proceeds, but they are wrong. The 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.* They can do anything. But they lose the litigation, the criminal suit, and they cannot prove substantial justification. In that circumstance, as in the Equal Access to Justice Act for civil litigation, you should be entitled to your attorney s fees reimbursed and the costs of litigation, again at the same modest rate. That, my friends, is justice.

143 Cong. Rec. H 7786-04, H7791 (Sept. 24, 1997) (emphasis added). In fact, [t]he law was intended specifically to curb abuses associated with...the subordination of perjury and the failure to disclose exculpatory evidence. *United States v. Ranger Electronic Communications, Inc,* 22 F.Supp. 2d 667, 673 (W.D. Mich. 1998), *rev d,* 210 F.3d 627 (6th Cir. 2000). Indeed, [a]s mentioned by [Congressman] Hyde, one of the special responsibilities of federal prosecutors is to disclose exculpatory information to criminal defendants. *Id.*

The Hyde Amendment may be analyzed as containing nine elements. *United States v. Holland,* 34 F.Supp. 2d 346, 359 (E.D. Va.), *reh g,* 48 F.Supp. 571 (E.D. Va. 1999), *aff d,* 214 F.3d 523 (4th Cir. 2000). In the instant case, most of the elements, should give the Court little pause.

¥ First, the Court must find that the case against Mr. XXXX was pending on the date of the enactment of [the Hyde Amendment]. The Hyde Amendment was enacted on November 26, 1997. *Id*. The instant case against Mr. XXXX was pending until July 21, 2000 when the Court entered its written order dismissing the case.

¥ Second, the Court must find that the case was a criminal case. There should be no dispute about that.

¥ Third, the Court must find that Mr. XXXX was not represented by assigned counsel paid for by the public. There is not dispute that Mr. XXXX was represented by private counsel at all times.

¥ Fourth, the Court must find that Mr. XXXX was the prevailing party. Clearly, this Court s dismissal of the remaining charge against Mr. XXXX during the recent second trial makes Mr. XXXX the prevailing party. Indeed, Mr. XXXX could not have achieved, as the result of any subsequent judicial proceedings, any more relief than he received from this Court. *See United States v. Gardner*, 23 F.Supp 2d 1283, 1289-91 (N.D. Okla. 1998).

¥ Fifth, as a corollary to the fourth element, the Court must find that the prevailing party was not the United States. Clearly, the United States was not the prevailing party in this case.

¥ Sixth, the court must find that the prosecution was vexatious, frivolous *or* in bad faith. This is not an all-or-nothing proposition. *United States v. Pritt*, 77 F.Supp. 2d 743, 747 (S.D. W.Va. 1999). For example, it is conceivable that a prosecution could be non-frivolous, yet still vexations and motivated by bad faith. *Id.* As set forth below in detail below, the prosecution against Mr. XXXX was vexatious, frivolous and brought in bad faith as those terms are defined by the Eleventh Circuit in *Gilbert*. *See Gilbert*, 198 F.3d at 198-99.

¥ Seventh, the Court must find that Mr. XXXX s attorneys fees and litigation costs are reasonable. This case involved numerous attorney hours: the initial trial, a new trial motion and a supplemental new trial motion, an appeal that was eventually dismissed when this Court indicated its intent to grant a new trial, a second trial, and the filing of the instant motion. Moreover, this case is unusual in that the charges for investigative services actually exceed the charges for attorneys s fees. Nevertheless, this case revolved around the actions of Helmut Groube, a German informant. As detailed below, the government steadfastly rebuffed the defense s efforts to obtain information regarding Groube. It was only through the dedicated efforts of Mr. XXXX s investigative team over the course of several years that the information about Groube s long history of deceit was developed to the point that this Court felt a new trial was appropriate. If the parties are unable to come to an agreement on the amount of reasonable attorneys fees and litigation expenses (*see Holland* 34 F.Supp 2d. at 374), the Court can then hold a hearing on this issue or request further briefing. *See, e.g. Ranger Electronic*, 22 F.Supp. 2d at 676-77.

¥ Eighth, the Court must identify the agency or agencies required to reimburse the attorneys fees and litigation costs. As discussed below, Mr. XXXX submits that the United States Attorney s Office for the Southern District of Florida as well as the Drug Enforcement Agency, both agencies within the Department of Justice, should be held jointly and severally liable for the reimbursement of his attorneys fees and litigation costs.

¥ Finally, the court must find that, assuming the other elements are met, there are not special circumstances that would justify an order requiring the reimbursement of attorneys fees and litigations costs. There are, in fact, no special circumstances which would militate against granting a Hyde Amendment motion in this case.[2]

In short, Mr. XXXX submits that the *only* element that will be in dispute is whether or not the prosecution against him was vexatious, frivolous and/or in bad faith. Mr. XXXX acknowledges that he has the burden of proving that the prosecution was vexatious, frivolous and/or in bad faith *by a preponderance of the evidence*. *See, e.g. United States v. Truesdale* 211 F.3d 898, 908 (5th Cir. 2000). As set forth below, Mr. XXXX believes the record in this case, as already developed and as may be supplemented with additional discovery, supports such a finding. Moreover, the Court in its July 21, 2000 dismissal order, has already effectively found that the prosecution was both vexatious and frivolous at least as of July 1994.

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[2] Because the Hyde Amendment incorporates the procedures and limitations of the Equal Access to Justice Act (the EAJA), one or two courts have also required a defendant to allege that he did not have a personal net worth over $2,000,000 at the time of his arrest. *See,. e.g., United States v. Gardner*, 23 F.Supp. 2d at 1293. Most courts have *not* grafted this element of an EAJA award onto the elements required to support reimbursement under the Hyde Amendment. Nevertheless, for the sake of completeness, Mr. XXXX certifies that hat he did not have a personal net worth over $2,000,000 at the time of his arrest.

III. VEXATIOUS AND/OR FRIVOLOUS AND/OR BAD FAITH PROSECUTION

As discussed above, in order to be entitled to reimbursement of attorneys fees and litigation expenses, Mr. XXXX must establish, only by the preponderance of the evidence, that the prosecution against him was vexatious or frivolous or in bad faith. Moreover, in the event the prosecution was not vexatious or frivolous at the onset, Mr. XXXX would still be entitled to attorneys fees and litigation expenses from the date on which the Court was to find that the prosecution became vexatious or frivolous or was continued in bad faith. *See Holland*, 34 F.Supp. 2d at 360, 374 (Award fees and expenses from January 6, 1998 - the date on which the court found the prosecution became vexatious- through the hearing on the Hyde Amendment application).

Vexatious means without reasonable or probable cause or excuse. A frivolous action is one that is [g]roundless...with little prospect of success... Finally, bad faith ...implies the conscious doing of a wrong because of dishonest purpose or morel obliquity;...it contemplates a state of mind affirmatively operating with furtive design or ill will. *Gilbert*, 198 F.3d at 198-99 (citations omitted). In applying these terms, it must always be kept in mind that the Hyde Amendment was intended specifically to curb abuses associated with...the subordination of perjury and the failure to disclose exculpatory evidence. *Ranger Electronic* 22 F.Supp. 2d at 673.

Mr. XXXX submits that the government engaged in a series of actions throughout its prosecution of this case that, considered independently and/or cumulatively, support a finding that the prosecution in this case was vexatious and/or frivolous and/or in bad faith. Mr. XXXX discusses these series of actions below.

1. Grand Jury Perjury By Case Agent Before the Grand Jury

As noted by one District Court in granting a Hyde Amendment claim, [t]he law was intended specifically to curb abuses associated with...the subordination of perjury and the failure to disclose exculpatory evidence. *Ranger Electronic*, 22 F.Supp. 2d at 673.

In order to obtain the indictment in this case, the government depended solely upon the testimony of Lee Lucas, an agent with the Drug Enforcement Agency. Lucas testified before the grand jury on April 16, 1993. In order to foreclose any entrapment defense, it was important for Lucas to convince the grand jury that it was Mr. XXXX, and not Groube, who was arranging the cocaine transaction and pushing it through. In order to do this, Lucas clearly perjured himself. Indeed, when excerpts of Lucas grand jury testimony (*see* Attachment 2) are compared to his trial testimony as well as the trial testimony of Groube, there are at least **five instances** of perjury that are immediately apparent.

a. Lucas claimed that Mr. XXXX introduced Jerry Smith to Helmut Groube in order to explain why Mr. XXXX was allegedly earning at $10,000 brokerage fee

1. Lucas Grand Jury testimony (pp. 3, 15)

Q. And could you briefly tell the Grand Jury, if you will, how you first became familiar with the facts?

A. I was advised by a DEA confidential informant [Groube] that he had met with a XXXX, his last name Joachim XXXX, also known as Count XXXX, that he had met with this Count XXXX at the office which is located in the Jockey Club here in Miami, and in Count XXXX s office *he was introduced to a black man, a black man who advised he was from Detroit.*

Q. Did this black man identify himself with respect to his name?

A. Yes, Jerry Lee Smith

* * * * *

Q. Did XXXX contact the CI first?

A. They had known each other previous to that, but I m not sure who contacted who. *But it was in the Count s office that the informant was introduced to the people from Detroit.*

2. Trial testimony of Helmut Groube (2/1/94 at pp. 144, 146-147; 2/2/94 at p. 95)

A. I get in contact with Jerry Smith, the gentleman and I had a meeting with him.

Q. When did you have this meeting?

A. It was the beginning of April. I think it was the 3rd, around?

Q. Around the third of April?

A. Yes.

Q. Did you--with respect to your controlling agent, did you tell him you were having this meeting or did he instruct you?

A. He instruct [sic.] me. I told him.

Q. Where did you have this meeting at?

A. It was in a hotel for breakfast and on the beach in Miami Beach. I don t remember exactly the name of the hotel.

Q. Who was present?

A. Jerry Smith. Harry [Pfeil] followed me.

* * * * *

Q. When was your next meeting in this case?

A. My next meeting in this case was on the same day in the afternoon by the Count.

Q. With the Count, the defendant Vonschlieffen you referred to?

A. Yes.

Q. Where as that meeting at?

A. At the office of the Count in the Jockey Club

* * * * *

Q. You say you had this breakfast meeting on the 3rd, correct?

A. Yes.

Q. *After* that meeting on the 3rd, your testimony on direct yesterday that same afternoon you met with XXXX at the Jockey Club, correct?

A. Yes.

2. Lucas claimed that Mr. XXXX was the one who called Groube on April 7, 1993 about the delivery of the cocaine to Jerry Smith

1. Lucas Grand Jury testimony (pp. 8-9)

Q. Was there a time when the group was concerned about where the cocaine was or the product they had paid for was?

A. Yes, because the second source of information [Pfeil], the second informant had given us the money along with the first informant [Groube], so the Count and the two people from Detroit were awaiting their cocaine, so we didn t deliver it the first day. We didn t deliver it on the 7th.

What happened was *the Count called us*. We told him that we would deliver the cocaine the next day. *The Count called the informant, which is tape-recorded.* The Count related everything that happened about the meeting, that the people from Detroit were angry because they wanted the cocaine delivered that day.

The Count basically laid out on the tape what had happened at the meeting with the second informant, how the money had been turned over.

2. Trial testimony of Helmut Groube (2/1/94 at pp. 156-57)

Q. And this call [on April 7, 1993] was made from?

A. From the office of the DEA

Q. *Who told you to make the call?*

A. *My control agent* [Lee Lucas].

3. Trial testimony of Lee Lucas (2/2/94 at p. 163)

Q. What happened after he turned over the money to you?

A. *I instructed Helmut Groube to make a tape recorded telephone call to Count Vonschlieffen.*

Q. What was the purpose of the telephone call?

A. To ascertain again why Helmut Groube brought the money and why he was given the money.

Q. Were there any other arrangements made for later on the evening of April seven, 1993?

A. Yes, I directed Helmut Groube to set up through that telephone call, to determine what was the purpose of the money and also to set up a meeting between Helmut Groube, Detective Paez, who was acting in an undercover capacity as a cocaine supplier, and Count XXXX.

3. Lucas claimed that Mr. XXXX was the one who began calling on April 8, 1993 to arrange the delivery of the cocaine.

1. Lucas Grand Jury testimony (p. 10)

Q. Well, what was the next actual meeting between the undercover agents and this group that wanted to buy the cocaine.

A. At about nine o clock in the morning *the Count XXXX telephoned the informant* and advised the informant to go ahead, everything was okay, that he had calmed down he people form Detroit and that he wanted the informant to go pick up the people--to go and pick up the people from Detroit up at the Ocean Rock Hotel, to go and do the cocaine deal and then later on to go meet with him, to meet with the Count to deliver his $10,000 brokerage fee.

2. Trial testimony of Helmut Groube (2/1/94 at p. 167; 2/2/94 p. 135)

Q. Tell me what you did when you were--how did you know when to go pick up Mr. Smith? Who told you?

A. I was in the office until the 8th. *My control agent* [Lee Lucas] *told me to pick up Mr. Smith.*

Q. So when did you go and where did you go?

A. It was around 2:00 in the afternoon on the 8th. I was in the Ocean Rock Hotel in Miami Beach, on Collins Avenue.

Q. 2:00 on the 8th. How did you know to go to the Ocean Rock Hotel?

A. Because I called twice Mr. Smith because I was delayed. *I set up this meeting.*

* * * * *

Q. The next day you were told, I believe this was your testimony, you were told on April 8th to bring Smith to the DEA office, to that undercover office, correct?

A. Yes.

Q. That is what you told the jury yesterday, right? That you were told I guess by Mr. Lucas?

A. Yes.

Q. To bring Mr. Smith to the DEA office?

A. Yes.

Q. In fact, you told the jury that Lee Lucas told you to go get Mr. Smith?

A. Pick him up, yes.

4. In order to divert attention that $10,000 of the $90,000 that Smith paid for the cocaine was stolen by Groube or Pfeil, Lucas lies about where the $10,000 that was ultimately given to Mr. XXXX came from

1. Lucas Grand Jury testimony (p. 14)

Q. Who paid the $10,000 brokerage fee to the Count?

A. We did.

Q. As part of what?

A. What happened was the people from Detroit gave us a bag of money for the cocaine. *Out of that bag* that they gave us, we took 10,000 out of it and gave it to the Count.....

2. Lucas trial testimony (2/2/94 at p. 222)

A. $10,00 was DEA money that was given to Detective Paez [to give to Mr. XXXX]

Q. That was not money from whatever Helmut Groube brought you.

A. No, it was not. *It was different money. I wanted to make that clear.*[3]

5. Lucas testifies that there is an audiotape and videotape of Mr. XXXX offering the use of his office to conduct the drug transaction in order to support the claim that Mr. XXXX brokered the transaction

1. Lucas Grand Jury testimony (pp. 18-19)

Q. On this audiotape and videotape, please tell the Grand Jury what they re saying.

A. The Count advised us his office could be utilized....

2. Audiotapes and Videotapes

The government has produced all audiotapes and videotapes made in connection with this case and *no* audiotape nor videotape exists in which Mr. XXXX offered the use of his office to conduct the drug transaction.

It should be clear that Agent Lucas perjured himself before the grand jury in order to minimize Groube s role in setting up this transaction and in order to fabricate predisposition on the part of Mr. XXXX. Indeed, Lucas told the grand jury that it was Mr. XXXX that

[3] Lucas changed his story once again at the second trial and claimed that he made a mistake during his testimony in the first trial and that the $10,000 did, in fact, come from the original money given to Pfeil by Smith. *See* Tr. 7/19/00 at 34. What Lucas did not explain is why he waited six years to bring this mistake to the Court s attention.

introduced the drug dealer, Jerry Smith, to Groube when, in reality, it was Groube that introduced Smith to Mr. XXXX. Lucas told the grand jury that it was Mr. XXXX that contacted Groube on April 7, 1993 when Pfeil disappeared with Smith s money when, in reality, it was Groube that contacted Mr. XXXX. Lucas told the grand jury that it was Mr. XXXX that arranged for Smith to pick up the cocaine on April 8, 1993 when, in reality, it was Groube that set up this meeting. In short, Lucas motivation for his false testimony before the grand jury is self-evident.[4]

Lucas perjury clearly supports a reimbursement order under the Hyde Amendment. Indeed, such perjury indicates that the prosecution was vexatious, frivolous *and* undertaken in bad faith. Moreover, given that the perjury was committed in order to secure the indictment in this case, this perjury supports reimbursement of Mr. XXXX s attorneys fees and litigation costs *from the onset of this action*.

2. Deportation of Harry Pfeil

As the Court will recall, the government itself admits that Harry Pfeil was present at **all** of the preliminary meetings between Helmut Groube and XXXX XXXX. Thus, Pfeil s

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[4] Ironically, the government has previously excused Lucas false statements to the grand jury because such statements were allegedly based upon what Lucas was told by Groube. *See* Government s Response to Defendant s Motion to dismiss Indictment Based Upon Grand Jury Perjury of Government s Agent (April 6, 2000). Essentially the government argued that the Court should conclude that any discrepancies between Groube and Lucas was based upon Groube lying to Lucas. Nevertheless, the government had no problem continuing to prosecute Mr. XXXX based upon the words and actions of Helmut Groube. This argument by the government, in and of itself, gives a strong indication that the prosecution against Mr. XXXX, based upon the words and actions of Helmut Groube, was, in fact, vexatious, frivolous and in bad faith.

testimony would be crucial to any claim by Mr. XXXX that he was entrapped by Helmut Groube during these preliminary meetings.

In an affidavit provided to the defense after the first trial in this matter (attached hereto as Attachment 3), Pfeil stated that he was alone when he met Jerry Smith and his girlfriend in the Marco Polo Hotel. He then introduced Smith to Groube at a breakfast meeting on Monday, April, 5, 1993. It was Groube that next proposed that the three of them (Pfeil, Groube and Smith) go to Mr. XXXX s office that afternoon to discuss real estate dealings. At that meeting, on the afternoon of April 5th, Pfeil introduced both Smith and Groube to Mr. XXXX for the first time.

According to Pfeil s affidavit, on April 7, 1993, Groube called Pfeil and told him to pick up Smith and take him to Mr. XXXX s office. Groube told Pfeil that Smith had something for him (Groube) regarding an unspecified business dealing between him and Smith. Once at Mr. XXXX s office, Smith, outside of Mr. XXXX s presence, gave Pfeil a bag containing $90,000 and told Pfeil to take the bag to Groube who was waiting downstairs. Pfeil counted the mon204,570.34 it downstairs to Groube.

Notably, Pfeil stated emphatically that, contrary to Groube s trial testimony, Mr. XXXX was never present when drugs were discussed. In short, Pfeil s testimony would have fully supported an entrapment defense by Mr. XXXX.

In his affidavit, Pfeil also explained the circumstances surrounding his deportation shortly before the January 31, 1994 trial in this matter. Pfeil explained that he was approached by Groube in November of 1993 and Groube inquired as to whether he was willing to be a government witness against Mr. XXXX. Mr. Pfeil told Groube that he did not have anything incriminating about which to testify against Mr. XXXX. Groube warned Pfeil that he should think about it in order to avoid trouble and the he (Groube) would come back in a few days. A few days later Groube returned. When Pfeil again told Groube that he would not testify falsely against Mr. Vonschlieffen, Groube stated, Good, then you ll suffer the same fate as the Count!

Groube then gave a signal and an immigration agent arrested Pfeil. Pfeil was deported to Germany on December 8, 1993.

Shockingly, the defense confirmed for the first time, as a result of references in this Court s June 21, 2000 order to an internal DEA memorandum, that Groube did, indeed, play a very active role in Pfeil s deportation for the purpose of making him unavailable to the defense. This Court wrote that [i]t is confirmed in [an internal DEA memorandum], prepared five (5) months after the [first] trial, that Groube forced the INS arrest (and subsequent deportation) of Pfeil. *See* Order Dismissing Indictment (July 21, 2000). [5]

As this Court recognized in its Order Dismissing Indictment, the United States Supreme Court held in *United States v. Valenzuela-Bernal*, 102 S.Ct. 3440 (1982) that when the government deports a witness who can give testimony material and favorable to a defendant s case, that defendant has been denied his right to due process of law as well as his right to compulsory process requiring dismissal of the indictment.

The government s actions with respect to the deportation of Harry Pfeil support relief under the Hyde Amendment for two reasons. First, the government acted in bad faith in deporting Pfeil and allowing Groube to force[] the INS arrest (and subsequent deportation) of Pfeil. Moreover, it allowed Groube to do this *after* the defense requested an opportunity to speak to Pfeil. Second, once the government realized that Pfeil had provided an affidavit (attached to Mr. XXXX s new trial motion filed on January 27, 1995) providing testimony that would have been material and favorable to Mr. XXXX s case, it was certainly frivolous to continue with the prosecution in light of the Supreme Court s decision in *Valenzuela-Bernal.* Ultimately, in light of Pfeil s affidavit and the government s disregard of the defense s request to

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[5] The defense had requested to speak to Pfeil prior to the first trial, as evidenced by a letter dated October 15, 1993 from defense counsel to the United States Attorney s Office. *See* Tr. 2/2/94 at 9-10. The government apparently ignored this request and, at the first trial, even went so far as to deny the request was made. *Id.*

interview Pfeil that was made prior to Pfeil s deportation, this Court s reliance on *Valenzuela-Bernal* can only be viewed as a foregone conclusion.

3. First Trial

At the initial trial in this matter, the government s chief witness was, of course, Helmut Groube. Not surprisingly, however, Groube engaged in repeated instances of perjury. Groube s lies are set forth below.[6]

a. Lie Number 1

To maintain his credibility, Groube testified to only one 1977 fraud conviction. *See* Tr. 2/1/94 at 140-41. In fact, at the time of the first trial, Groube had also been convicted of false swearing on an affidavit.

b. Lie Number 2

In order not to appear as a rogue informant intent on targeting and entrapping innocent persons for compensation, Groube testified repeatedly that he told his DEA handler, Lee Lucas, about *all* of the several alleged meetings he had with Mr. XXXX between March 30, 1993 and April 5, 1993 as well as the meetings with Jerry Smith on April 3, 1993. *See* Tr. 2/1/94 at 144, 146, 148; 2/2/94 at 82-83. Agent Lucas, on the other hand, testified that he did not become aware of Groube s actions until April 5, 1993. *See* 2/2/94 at 151, 182, 190. The case agent in the first trial, Elizabeth Cullinane, offered similar testimony to Agent Lucas. *See* 2/3/94 at 43.

c. Lie Number 3

Groube claimed that he *and* Pfeil initially met with Smith for breakfast on April 3, 1993, to discuss a cocaine transaction. *See* Tr. 2/1/94 at 146. Nevertheless, Agent Cullinane, testified that Pfeil *never* met Smith on the morning of April 3rd. *See* Tr. 2/3/94 at 170.

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[6] As noted *infra.* at footnote 4, there are numerous discrepancies between the trial testimony of Groube and the trial and grand jury testimony of Lucas. For purposes of this motion, it is sufficient that *either* Groube or Lucas committed repeated acts of perjury and it is not necessary to determine which of the government witnesses was *most* culpable.

d. Lie Number 4

Groube testified at trial that he did not know anything about the circumstances regarding Pfeil s deportation but only knew that he had been deported. *See* Tr. 2/2/94 at 79. Nevertheless, as noted above, in the Court s order dismissing the indictment in this case, the Court noted that [i]t is confirmed in [an internal DEA memorandum], prepared five (5) months after the [first] trial, that Groube forced the INS arrest (and subsequent deportation) of Pfeil. *See* Order Dismissing Indictment (July 21, 2000).

e. Lie Number 5

Groube sponsored a government trial exhibit which he claimed was a bill from a meeting he and Pfeil had with Smith and James Skief at Shooter s Restaurant. *See* Tr. at 2/1/94 at 152-53. Given the fact that Groube claimed that there were four persons present and the bill reflected four beers, the bill perfectly supported Groube s testimony. Nevertheless, Skief s attorney established, without question, at the first trial that the bill sponsored by Groube was *not* the bill from the meeting. *See* Tr. at 2/2/94 at 125-28.

f. Lie Number 6

Groube testified that he was *never* told he had to pay taxes on the over $400,000 he was paid as a DEA informant. *See* Tr. 2/2/94 at 78. In contrast, Agent Lucas testified that, not only did he tell Groube about his obligation to pay taxes on this money, but Groube also signed a CI agreement advising him of the obligation. *See* Tr. 2/2/94 at 238. [7]

g. Lie Number 7

In order to lessen the impact of the shocking amount of taxpayer money that Groube received as a confidential informant, he explained that it was a full time endeavor preventing him from working and receiving traditional income. *See* Tr. 2/2/94 at 118. (Q. You don t have

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[7] Despite the fact that this CI agreement would have gone directly to impeach Groube s credibility and obviously would have been contained in Groube s CI file, to this date the government has not produced the CI agreement in connection with its *Brady* obligations.

any other jobs? A. No, because I don t have time.). In point of fact, Groube maintained, among other jobs, a job at a restaurant. *See* Tr. 2/2/94 at 216.

h. Lie Number 8

Groube told the first trial jury that he had no idea how his compensation for making cases was determined. *See* Tr. 2/2/94 at 131. Agent Lucas, on the other hand, testified that he himself told Groube the factors upon which his compensation was based. *See* Tr. 2/2/94 at 211-212.

i. Lie Number 9

It is not surprising that Groube lied about not knowing the factors upon which his compensation was determined because it was based, in large part, upon seizures and forfeitures that arose out of his cases. *Id.* That is probably why Groube again lied to the first trial jury and stated unequivocally that he did not talk to Mr. XXXX about driving one of Mr. XXXX s expensive automobile to the arrest location. *See* 2/1/94 at 177. Nevertheless, after Groube s perjured testimony in this regard, a tape of the conversation in the German language, wherein Groube made the very request that he testified he did not make, was discovered. As a result, the government was forced to stipulate that its informant, Groube, requested Mr. XXXX to drive the car to the arrest location. *See* Tr. 2/3/94 at 80 (Government stipulates that Helmut says, Can we drive the sports car a little to show off for our friend?).

As noted above, the Hyde Amendment was meant to protect a criminal defendant from prosecution based upon a foundation of perjury. That is exactly what happened in the instant case. Not surprisingly, by the time of the second trial, Groube was so discredited that the government refused to produce him as a witness. In any event, the repeated instance of perjury at the first trial, instances of perjury about which the government was obviously aware, rendered the first trial vexatious and certainly supports the granting of a motion under the Hyde Amendment.

4. Suppression of *Brady* and *Jencks* material

As note above, [a]s mentioned by Hyde, one of the special responsibilities of federal prosecutors is to disclose exculpatory information to criminal defendants. *Ranger Electronic*, 22

F.Supp. 2d at 673. Indeed, in *Ranger Electronic* the District Court for the Western District of Michigan granted a Hyde Amendment motion based upon the government s *Brady* violations in that case. *Id* at 676 (Upon review of the alleged misconduct, the Court determines that the conduct of the Assistant United States Attorney assigned this matter violated his obligations to share exculpatory information under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) and constituted bad faith within the meaning of the Hyde Amendment.). [8]

The government s repeated discovery violations in this case certainly support characterizing the prosecution as vexatious and in bad faith and is the very type of behavior that the Hyde Amendment sought to protect criminal defendants against. Indeed, at every turn of this litigation, the government thwarted the defense s efforts to obtain more information about Helmut Groube in order to support an entrapment defense. Two examples of this were discovered during the first day of the second trial. It was then that the defense learned for the first time that there existed a DEA memo authored by a trial witness, Agent Lee Lucas, memorializing his instruction to Groube *not* to work with Harry Pfeil on this case. *See* Attachment 4. It was then the defense learned for the first time that in the same DEA memo, Lucas characterized Groube as a **rogue informant**. *See* Tr. 7/19/00 at 54.[9] On the day depositions were taken during the second trial, the government s cross examination questions of Peter Mueller, also indicated a falling out between the DEA and Groube. *See* Tr. 7/20/00 at 42. Nevertheless, the defense to this day has not been provided with any information regarding a falling out.

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[8] The District Court s decision was reversed on appeal but only because the Court of Appeals held that the Defendant s Hyde Amendment motion was filed too late. *See Ranger Electronic*, 210 F.3d at 627.

[9] Given that Lucas testified at both the first trial and the second trial regarding the actions of Groube and Pfeil, this DEA memo clearly qualifies as *Jencks* material under 18 U.S.C./3500. Nevertheless, the memo was never given to the defense in connection with either trial.

The information that came to light during the second trial was just the tip of a very large iceberg. When defense counsel first met with Assistant United States Attorney Foster-Steers regarding this case on February 16, 2000, she told counsel that *Brady* material existed with respect to Groube and *Brady* material possibly existed with respect to Agent Lucas. Still, this information was never produced. The Court will recall that it then held a hearing on May 5, 2000 in response to Mr. XXXX s various motions to dismiss. At that hearing, the Court *ordered* the government to produce *Brady* material within ten days and then entered a written order to the same effect on May 8, 2000. The Court explained that it was necessary for the government to produce the information so the Court could rule on the various motions.

The Court first requested the government to divulge Groube s criminal history. Despite the fact that Groube had a long line of history of convictions in Germany,[10] the government s only response to the Court s order was that it had made a written request through the German liaison, who had yet to respond. *See* Government s Response to Order to Produce (May 18, 2000) at 1-2. **In fact, after the second trial a defense investigator, Carlos Fuentes, made contact with Groube and Groube states unequivocally the that United States government was fully aware of his complete criminal record.**[11] Indeed, it strains credulity to believe that information regarding Groube s criminal history was not contained in Groube s confidential informant file in the possession of the DEA. Moreover, it strains credulity to believe that the defense could obtain information about Groube s convictions that the United Stats of America could not.

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[10] 1978-Continuous Fraud

1984-Intentional False Swearing on an Affidavit

1992-Continuous Fraud

1997-Perjury

[11] An affidavit from Mr. Fuentes regarding his conversation with Helmut Groube will be submitted under separate cover.

In its *Brady* order, the Court also ordered the government to provide a list of the disposition of cases where Groube was a witness-informant. Although Mr. Groube previously testified that he had been a witness-informant in sixteen to eighteen cases for the DEA, and prior to that had been an informant for the German BKA for twelve years (*see* Tr. 2/1/94 at 140), the government provided the disposition of only **one** case in its response to the Court s *Brady* order. *See* Government s Response to Order to Produce (May 18, 2000) at 2.

The government s failure to comply with its *Brady* and *Jencks* obligations appears to be due, in part, to its total misunderstanding of its obligations in this regard. The government apparently believed that its obligations were limited to Groube s activities in the instant case alone. Nevertheless, given that Mr. XXXX s entrapment defense put Groube s credibility directly at issue and called into question his activities as an informant, there can be no doubt that information regarding Groube s credibility and/or questionable informant activities in other cases were highly relevant. *Cf. United States v. McClure*, 546 F.2d 670, 672-73 (5th Cir. 1984) (Reversing trial court s exclusion of testimony concerning government informant s previous coercive enforcement techniques). Through its own investigation as well as through the media, the defense gleaned a portion of Groube s checkered history.[12] Nevertheless, there was a wholesale failure of the government to comply with its *Brady* and *Jencks* obligations.

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[12] A great deal of information concerning Groube s unreliable informant activity had come to light in the media. In Germany, a television documentary aired concerning Groube entitled *King Rat*. This documentary led to a German parliamentary investigation of the BKA s use of informants. In the United States, the unreliable informant work of Groube was highlighted in a series of newspaper articles called *Win at All Costs*, published in the Pittsburgh Post-Gazette in November 1998. *See* Attachment 5. Given the revelations about Groube contained in the television documentary and in the newspaper article, it is simply unbelievable that the government did not possess *Brady* material regarding Groube.

Moreover, not only did the government fail to fulfill its constitutional obligations, it actively interfered with the defense investigation. Indeed, the German BKA liaison was apparently told not to speak to the defense and the defense was warned in a letter by Assistant United States Attorney L. Foster-Steers not to make direct contact with the German BKA liaison. *See* Attachment 6.

In short, the government failure to provide required *Brady* material to the defense prior to trial and *Jencks* material to the defense during trial, especially as that material related to Groube s credibility and activities as an informant, was in bad faith and made the continued prosecution of this case vexatious. The fact that the government, to this day, has failed to produce Groube s confidential informant file to this Court (*i.e.* the file containing the most comprehensive information about Groube) further confirms the fact that government s continued prosecution of Mr. XXXX was both vexatious and in bad faith.

5. Second Trial

Prior to the second trial, the defense put the government on notice that it was planning on asserting an entrapment defense. The United States Supreme Court, in *Jacobson v. United States*, 503 U.S. 540 (1992), held that, in order for the government to negate an entrapment defense, it is not enough to show that the defendant is ready and willing at the time he was specifically asked to engage in the proscribed conduct. The government needs to prove that this predisposition was independent and not the product of the attention the government had directed at him over a particular time span.

Of course, the *only* witnesses that the government could possibly call to testify regarding Mr. XXXX s predisposition prior to the time he was asked to engage in the proscribed conduct would have been Groube and/or Pfeil. Nevertheless, the government announced it had no intention of calling these witnesses at the second trial. **When the Court informed the government during a pre-trial telephone conference on July 6, 2000 that, absent Groube s testimony on this issue, it would likely direct a verdict in favor of Mr. XXXX, the government still persisted in going forward this prosecution.**

At the second trial, the only fact witnesses on the government s witness list were Lucas, who had no independent knowledge of Mr. XXXX s actions and was totally dependent upon what he was told by Groube, and Detective Paez who did not get involved in this case until several days after Groube and Pfeil initially made contact with Mr. XXXX. In short, the government could not possibly have met the *Jacobson* standard for refuting an entrapment defense without the testimony of Groube and/or Pfeil.

To continue with the second trial after being explicitly told by the Court that it would likely direct a verdict for the defense and without the ability to call witnesses to rebut Mr. XXXX s entrapment defense clearly makes the second trial a frivolous action one that is groundless...with little prospect of success.... *Gilbert*, 198 F.3d at 198-99.

6. Use of Helmut Groube and Harry Pfeil as informants

The government s use of Groube and Pfeil as informants in reverse sting cases should shock this Court conscience. **Moreover, because Groube was acting as a government agent, his actions are imputed to the government.**

As noted above, on the second day of the second trial, the defense, for the first time, learned there was a DEA memo authored by Agent Lucas, memorializing his instruction to Groube *not* to work with Harry Pfeil on this case. *See* Attachment 4. Nevertheless, Groube ignored this instruction and the government was nonplused.

At the time Groube was used to set up Mr. XXXX, he had previous convictions for fraud and false swearing on an affidavit. By the time of the second trial, he racked up an additional fraud conviction and one for perjury. In addition, at least one German judge found Groube completely unreliable as an informant and the BKA totally changed the way it dealt with informants. *See* Tr. 7/20/00 at 61-66. Finally, Groube himself admitted to German Journalist Peter Mueller that he entrapped Mr. XXXX as the behest of a German bank. *Id*. at 25-47. Still the government has paid Groube $433,564 for his work as a DEA informant (money on which Groube unlawfully failed to pay taxes). *See* Attachment 7. Indeed, the government made a payment to Groube as late as February 1998.

As noted above, the government allowed Groube to continually perjure himself at the first trial. Shortly before the second trial, the government all but admitted that Groube engaged in outright falsehoods during that trial. *See* Government s Response to Defendant s Motion to Dismiss Indictment Based Upon Government s Outrageous Conduct (April 6, 2000) at 4. These outright falsehoods were so serious that the government consented to the dismissal of this case rather than produce Groube for examination by the Court. Moreover, on the first day of the second trial, the defense learned for the first time that in a DEA memo, Agent Lucas characterized Groube as a **rogue informant**. *See* Tr. 7/19/00 at 54.

Groube s history of deceit and criminal activities was previously presented to this Court in the form on an affidavit from Gary McDaniel, a private investigator licensed by the State of Florida. *See* Attachment 8.

To prosecute Mr. XXXX upon the words and actions of Pfeil, who the DEA specifically told Groube *not* to use, and to rely upon the words and actions Groube, who, according to the government, was rogue informant who engaged in outright falsehoods rises to the level of a frivolous action brought in bad faith. This would support reimbursement of attorneys fees and litigation costs under the Hyde Amendment at least from July 1994 when the internal DEA memo was authored by Agent Lucas characterizing Groube as a rogue informant. [13]

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[13] The ultimate irony is found in Lucas testimony during the second trial. When asked to explain to the jury what a confidential informant was, he explained that they came to the DEA office to be signed up and then the DEA would do background checks on them. *See* Tr. 7/19/2000 at 21. Given Groube s association with the DEA, Lucas testimony is rendered ludicrous.

IV. ATTORNEYS FEES AND LITIGATION COSTS

Given the Court s July 21, 2000 order dismissing the case, there is really no question that Mr. XXXX is entitled to reimbursement of **at least** his attorneys fees and litigation costs from July 1994 until resolution of this motion. As noted above, in the July 21, 2000 order, the Court found that the government realized five months after the first trial in this matter, in other words by July 1994, that it had been exploited by [Groube and Pfeil]. *See* Order Dismissing Indictment (July 21, 2000). Thus, this Court has essentially established, under the law of the case doctrine, that, at least as of July of 1994, the continued prosecution of Mr. XXXX was not viable.

Of course, as set forth above, Mr. XXXX, submits that the government should have know from the initial stages of this case that its prosecution of Mr. XXXX was not viable and he further submits that he is entitled to reimbursement of *all* his attorneys fees and related litigation expenses. Indeed, the entire case was set into action by the grand jury s indictment and its belief that Mr. XXXX brokered a cocaine transaction, yet that indictment was predicated on the perjury of Agent Lucas. Moreover, even prior to the first trial, the government deported Harry Pfeil despite the defense s October 15, 1993 request to speak to Pfeil. Of course, it was later discovery that Groube forced the INS arrest and deportation of file. *See* Order Dismissing Indictment (July 21, 2000).

The dismissal of the case against Mr. XXXX came only as the result of many attorney hours spent in securing a new trial and the ultimate dismissal of the charges and a tireless investigative efforts, over several years, in order to obtain the information about Groube that the government refused to turn over and provide to the Court. As set forth above, in order to win his freedom, Mr. XXXX estimates that he spent approximately $180,725.75 in attorneys fees and $204,570.34 in related litigation expenses. Mr. XXXX submits that he is entitled to reimbursement for this entire amount by the United States Attorney s Office for the Southern

District of Florida, the Drug Enforcement Agency and/or the Department of Justice.[14]

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[14] Under the Hyde Amendment, the Court the must identify the agency or agencies required to reimburse the attorneys fees and litigation costs. *See Holland,* 34 F.Supp. 2d at 359. Given the actions of Agent Lucas and the DEA in handling Groube and Pfeil the DEA can be held responsible for the reimbursement under the Hyde Amendment. Likewise, the actions of the United States Attorney s Office for the Southern District of Florida in prosecuting this action and ignoring its obligations under *Brady* and *Jencks* certainly supports an order requiring that agency to reimburse Mr. XXXX for attorneys fees and litigation expenses. Therefore, the Court should find the DEA and the United States Attorney s Office for the Southern District of Florida jointly and severally liable under the Hyde Amendment or, in the alternative, since both agencies are part of the Department of Justice, order the Department of Justice to pay the

V. CONCLUSION

The German journalist, Peter Mueller, explained to this Court how the actions of Helmut Groube changed the entire way in which the German government uses confidential informants. Unfortunately, in the United States, as indicated by the government s payments to Groube as late as February 1998 and its continued prosecution of Mr. XXXX, is business as usual. It is shameful when one compares the ramifications of Groube s actions in Germany to the efforts by the United States government to cover up its problems with Helmut Groube and informants of his character. While Germany changed its system, the United States went ahead with a prosecution it could not win. Its actions in this case even surpass the nightmares that predicated the passage of the Hyde Amendment.

This Court, unfortunately, does not have the ability to change the system. Nevertheless, it does have the power and the obligation to do justice in individual cases and send a message that the government s actions will not be tolerated. This case is replete with examples of ways in which the government acted vexatiously, frivolously and/or in bad faith. Indeed, there is plenty of blame to go around. The actions of Groube, who at all times was acting as a government agent, are nothing short of shocking. Moreover, because Groube was acting as a governmetn agent, his actions are imputed to the government. and for whom agentMr. XXXX will not be able to reclaim the more than seven years of his life spent in prison. Reimbursement of his attorney s fees and litigation expenses in the amount of $385,296.09 is the least that is appropriate.

Respectfully submitted,

F. Clinton Broden
Tx. Bar 24001495

Mick Mickelsen
Tx. Bar 140011020
Broden & Mickelsen
2715 Guillot
Dallas, TX 75204
(214) 720-9552
(214) 720-9594 (facsimile)

LOCAL COUNSEL

Howard J. Schumacher
Fl. Bar 776335
One East Broward Boulevard, Suite 700
Ft. Lauderdale, FL 33301
(954) 356-0477

Attorneys for Defendant
XXXX XXXX

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on August 17, 2000, I caused the foregoing document to be served by United States Mail, postage prepaid, on L. Foster-Steers, Assistant United States Attorney, 99 N.E. Fourth Street, Miami, Florida 33132.

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F. Clinton Broden