APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1923

UNITED STATES OF AMERICA,
Appellant

v.

MARIO NELSON REYES-ROMERO

On Appeal from the United States District Court
for the Western District of Pennsylvania
(W.D. Pa. No. 2:17-cr-00292-001)
Hon. Mark R. Hornak,
Chief United States District Judge

Argued March 3, 2020

Before: SMITH, *Chief Judge*, HARDIMAN, and
KRAUSE, *Circuit Judges*

(Filed: May 19, 2020)

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OPINION OF THE COURT

KRAUSE, *Circuit Judge*.

Under the Hyde Amendment, a prevailing defendant in a federal criminal prosecution can apply to have his attorney's fees and costs covered by the government. Such an award is appropriate only if the defendant shows that "the position of the United States" in the prosecution "was vexatious, frivolous, or in bad faith." Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (codified at 18 U.S.C. § 3006A app.). That standard is demanding, and it requires far-reaching prosecutorial misconduct affecting the criminal case "as an inclusive whole." *United States v. Manzo*, 712 F.3d 805, 810 (3d Cir. 2013). Short of that standard, the Hyde Amendment is not an appropriate vehicle to criticize the conduct of law enforcement officers or second-guess the management of a criminal prosecution.

The District Court here awarded attorney's fees and costs under the Hyde Amendment to Mario Nelson Reyes-Romero, who was prosecuted for unlawful reentry in violation of 8 U.S.C. § 1326, on the grounds that the prosecution was frivolous and in bad faith. Although assuredly born of good intentions and understandable frustration with faulty processes in the underlying removal proceeding here, that award was not based on the type of pervasive prosecutorial misconduct with which the Amendment is concerned. Accordingly, we will reverse.

I. BACKGROUND

The relevant background can be divided into three stages. First, Reyes-Romero, a noncitizen,[1] was subject to an administrative removal proceeding and removed from the country. Second, he returned to the United States and was prosecuted for unlawful reentry, a charge that he collaterally attacked under 8 U.S.C. § 1326(d) and that the District Court ultimately dismissed. Third, he sought and was awarded attorney's fees and costs under the Hyde Amendment. Because a complete understanding of this history is crucial for analyzing the question presented, we discuss each stage in some detail.

A. 2011 Administrative Removal Proceeding

Reyes-Romero, an El Salvadoran national, entered the United States unlawfully in 2004. In 2008, the Department of Homeland Security (DHS) initiated

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[1] We follow the Supreme Court's lead in using the term "noncitizen" to "refer to any person who is not a citizen or national of the United States." *Pereira v. Sessions*, 138 S. Ct. 2105, 2110 n.1 (2018).

removal proceedings on the ground that he was "present in the United States without [having] be[en] admitted or paroled," 8 U.S.C. § 1182(a)(6)(A)(i). A year later, after Reyes-Romero pleaded guilty to aggravated assault in New Jersey state court,[2] DHS aborted the § 1182 proceeding and placed him in expedited administrative removal on the ground that his conviction constituted an "aggravated felony," 8 U.S.C. § 1228(b)(1), namely a "crime of violence," *id.* § 1101(a)(43)(F) (incorporating 18 U.S.C. § 16's definition).

In 2011, DHS officers Trushant Darji and Jose Alicea conducted Reyes-Romero's administrative removal proceeding. The officers first served him with a Form I-826, which sets out a "Notice of Rights and Request for Disposition." App. 180. It is unclear why they did so, as the I-826 does not apply to noncitizens in expedited removal because of an aggravated felony conviction. For instance, the I-826 instructed Reyes-Romero he "ha[d] the right to a hearing before the Immigration Court," *id.*, even though administrative removal is conducted by immigration officers outside of the Immigration Court, *see* 8 U.S.C. § 1228(a)(3), (b)(1). Adding to the confusion, two boxes on the I-826 corresponding with contradictory declarations were checked, indicating Reyes-Romero had both "request[ed] a hearing before the Immigration Court"

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[2] The statute under which Reyes-Romero was convicted makes it a second-degree felony to "[a]ttempt[] to cause serious bodily injury to another, or cause[] injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly cause[] such injury." N.J. Stat. Ann. § 2C:12-1(b)(1). He was sentenced to time served (397 days) and three years' supervised release.

to determine his right to remain in the country and had "give[n] up [his] right to a hearing" so he could be returned to El Salvador. App. 180.

The officers then presented Reyes-Romero with the applicable form—a Form I-851, the "Notice of Intent to Issue a Final Administrative Removal Order" that governs noncitizens who are charged with having committed an aggravated felony. App. 96–97. The I-851 informed Reyes-Romero of the grounds for expedited removal, his ability to contest those grounds, and the option to raise any "fear [of] persecution" related to his return to El Salvador. *Id.* That form indicated Reyes-Romero conceded removability, "acknowledge[d] that [he was] not eligible for any form of relief from removal," and waived judicial review. App. 97. But close examination of the I-851 reveals it to be irregular. Reyes-Romero apparently executed the waiver of his rights at 9:00 AM—twenty minutes before the time stamp next to a certification that the form had been translated into Spanish for his benefit and forty minutes before the time stamp accompanying the relevant DHS supervisor's issuing signature.

Reyes-Romero received a final administrative removal order that afternoon and was later removed to El Salvador.

B. Unlawful Reentry Prosecution

Reyes-Romero returned to the United States without inspection and, after he was found and detained, a federal grand jury returned an indictment charging him with unlawful reentry in violation of 8 U.S.C. § 1326. He did not contest any of the elements of that offense—that he had been "removed" and was

later "found in" the country without express consent, 8 U.S.C. § 1326(a).

Instead, Reyes-Romero moved to dismiss the indictment under a statutory provision allowing him to "challenge the validity of the [removal] order" on which the prosecution was based, 8 U.S.C. § 1326(d). Under § 1326(d), a defendant bears the burden of showing that (1) he "exhausted any administrative remedies that may have been available to seek relief against the [removal] order"; (2) the removal proceedings "improperly deprived [him] of the opportunity for judicial review"; and (3) the "entry of the [removal] order was fundamentally unfair." *Richardson v. United States*, 558 F.3d 216, 223 (3d Cir. 2009) (quoting 8 U.S.C. § 1326(d)(1)–(3)). "Fundamentally unfair" means "both [(a)] that some fundamental error occurred and [(b)] that as a result of that fundamental error [the defendant] suffered prejudice." *United States v. Charleswell*, 456 F.3d 347, 358 (3d Cir. 2006).

Reyes-Romero's motion advanced two arguments. First, the 2011 administrative removal proceeding, with its contradictory forms and the "inconsisten[t]" selections on the I-826, "had an impermissible tendency to mislead" him and invalidated any waiver of his rights. App. 71. Second, the proceeding was "fundamentally unfair" because he had not committed an aggravated felony and therefore was entitled to a full hearing before an immigration judge (IJ).[3] App. 72.

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[3] In *Baptiste v. Attorney General*, 841 F.3d 601 (3d Cir. 2016)—a case involving the same offense of which Reyes-Romero was convicted—we held that 18 U.S.C. § 16(b), the "residual" clause

The Government resisted on both fronts. In its view, Reyes-Romero's I-851 waiver was valid and overcame any inconsistency on the I-826, and as a result he had failed to exhaust administrative remedies or seek judicial review as required by § 1326(d)(1) and (2). And in any event he failed to show prejudice as required by § 1326(d)(3) because he had not demonstrated "a reasonable likelihood that the result"—i.e., the removal order—"would have been different" but for the errors he identified. App. 225 (quoting *Charleswell*, 456 F.3d at 362).

The District Court held a hearing on the § 1326(d) motion. It first addressed the I-851 waiver and its effect on § 1326(d)'s exhaustion and judicial-review requirements. The Court expressed concerns not only with the "inconsistent" nature of the I-826 and I-851 forms but also with the I-851's time stamps suggesting Reyes-Romero had been informed of his rights *after* signing the waiver—an argument Reyes-Romero had not developed in his brief. The Court told Adam Hallowell, the Assistant United States Attorney (AUSA) prosecuting the case, that the Government

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of the federal crime-of-violence definition, is void for vagueness. 841 F.3d at 615–21. *Baptiste*'s reasoning was ultimately embraced by the Supreme Court in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210 (2018). But *Baptiste* avoided the question whether New Jersey second-degree aggravated assault qualifies as a crime of violence under § 16(a), the crime-of-violence definition's "elements" clause. 841 F.3d at 606 n.4. As discussed below, that question turns on whether a state crime capable of commission by reckless conduct can categorically satisfy the elements clause, an issue that remains unresolved. *See Borden v. United States*, 140 S. Ct. 1262 (2020) (granting certiorari on this issue).

was "in a deep hole" because the immigration forms were "facially at odds with themselves." App. 283.

The Government called Officers Darji and Alicea as witnesses. Each had no memory of Reyes-Romero or his proceeding and had handled a substantial number of immigration cases in the years since 2011, so they testified only to general practices. Darji explained that he often worked with native Spanish speakers like Alicea to serve immigration forms on noncitizens in DHS custody. Noncitizens charged with having committed aggravated felonies would first receive the "more general" I-826 form before receiving the I-851 form "specific to administrative removal." App. 294. The noncitizen would typically "hold the pen" and make necessary selections. App. 291. If the noncitizen made contradictory or nonsensical selections, the officers would confirm his intent but otherwise leave those selections untouched.

The District Court, interposing its own questions at the hearing, pressed Officer Darji about Reyes-Romero's forms:

> THE COURT: . . . [A]m I reading the[se forms] accurately that within moments of 9 o'clock in the morning on June 23rd, 2011, several things had occurred pretty much all at once. This defendant was told he had a right to request a hearing. He requested a hearing. He said he didn't want a hearing. And he was told he couldn't have a hearing. Am I reading those forms correctly, sir?
>
> THE WITNESS: Yes.
>
> THE COURT: Does that make any sense at all to you, sir?
>
> THE WITNESS: No, Your Honor.

App. 331. The District Court took Officer Darji's response to mean that "the process that was used" in Reyes-Romero's removal proceeding did not "ma[k]e . . . sense." App. 476.

Based on that concession and the defects in Reyes-Romero's forms, the District Court made clear it was "highly likely . . . [to] conclude that there was no voluntary and intelligent waiver" and therefore that "the first two prongs of [§ 1326(d)] will have been fulfilled." App. 474–75.

The parties' attention therefore turned to the "only open issue": prejudice. App. 543. At first, Reyes-Romero repeated the argument he had advanced in his brief: that the misidentification of his crime of conviction as an aggravated felony itself constituted prejudice. But after the District Court pressed him about "the reasonable likelihood of some different result" in the removal proceeding, App. 442, he switched gears, arguing that he could have sought asylum or withholding of removal. To bolster that novel argument, he offered testimony from relatives who had suffered abuses in El Salvador or in neighboring Honduras. Seeking more support, Reyes-Romero requested his relatives' A-files, and the parties set out on a multi-week process to get them from DHS. The Court held Reyes-Romero's motion while that process was underway and requested supplemental briefing to be filed once it was complete.

While his § 1326(d) motion was pending, Reyes-Romero moved for bond. The District Court expressed concern that, were Reyes-Romero to be released, DHS officials would detain him, reinstate the 2011 removal order, and remove him to El Salvador. The Court also

wondered aloud whether DHS would take different action if Reyes-Romero were released after the Government had "move[d] to dismiss the indictment," App. 566.

The Government soon came back with a surprise: a motion to dismiss the indictment with prejudice under Federal Rule of Criminal Procedure 48.[4] It explained that based on the evidence at the first hearing "and on additional factual information that ha[d] come to [its] attention" since then, dismissal was "in the interests of justice." App. 603. In another surprise, Reyes-Romero opposed the Government's motion, contending the District Court should grant it only if it also intervened in future immigration proceedings by expressly "barr[ing] [the Government] from removing [him] on the basis of the [2011 removal] [o]rder." App. 608.

When the parties convened for a hearing to address the Government's motion to dismiss, the Government clarified that the "additional . . . information" to which it had referred came from Reyes-Romero's relatives' A-files, some of which "support[ed] the testimony" he had offered in support of relief from removal. App. 645. The Government's decision to seek dismissal, it explained, was based on the "litigation risk to th[e] [§ 1326(d)] affirmative defense" and the "time and expense" necessary to continue the prosecution. App. 646. But the District Court was hesitant, asking the Government whether Reyes-Romero risked detention or removal even after dismissal with prejudice, to which the Government replied that it "c[ould] [not]

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[4] "The government may, with leave of court, dismiss an indictment . . . ." Fed. R. Crim. P. 48(a).

speak for DHS," App. 617. The Court also noted its views that the DHS officers' testimony had been "bizarre" and possibly untruthful, App. 634–35, and that Reyes-Romero's 2011 removal "was not . . . consistent with the highest traditions of the American legal system," App. 657. Still, the Court made clear it was not accusing the prosecution "of any wrongdoing whatsoever," App. 634, and suggested the Government's decision not to proceed with the prosecution was "how we want the system to work," App. 635.

Yet when the hearing resumed the next day, the District Court's assessment had evolved. It now expressed the view that the DHS officers' testimony was not just "bizarre," but a mix of "lies" and "law enforcement outrageousness." App. 677. And it recalled Officer Darji's answer to its line of questioning to have meant not just that "the process . . . used" in the removal proceeding did not "ma[k]e any sense," App. 476, but that "*his* [*own*] *testimony* made no sense," App. 678 (emphasis added). Most significant, the Court no longer deemed AUSA Hallowell blameless, but as needing to make a "choice" about whether he would "continue to rely on th[e] [officers'] testimony." App. 678–79. Even if the prosecution was not responsible for errors in the removal proceeding, it said, there "come[s] a point where" the Government "adopt[s]" those errors as its own. App. 679. The Court again held all motions open pending further briefing.

In an effort to respond to the concerns voiced by the District Court, the Government filed a supplemental brief raising two points: First, the District Court lacked jurisdiction to condition a Rule 48 dismissal on

the actions of an independent department—here, on DHS's forgoing future removal proceedings based on the 2011 order. Second, the Government made unambiguous that it was not "rely[ing] on or adopt[ing]" the DHS officers' testimony and was no longer contesting any element of the § 1326(d) defense "other than the issue of prejudice." App. 755.

But the Government's brief came with yet another surprise. At the start of the prosecution, the U.S. Attorney's Office had received black-and-white copies of Reyes-Romero's A-file from DHS and had shared those files with Reyes-Romero's counsel. Neither counsel had previously asked to inspect the originals. But before filing its supplemental brief, the prosecution obtained the original documents, which revealed that the two inconsistent checks on the I-826—one requesting a hearing, the other waiving it—were made in different colors. And based on the ink color, it appeared the DHS officer who signed the form had filled in the box corresponding to Reyes-Romero's waiver of rights. Even more odd, the waiver box featured a blue mark drawn over a pre-printed black "x," suggesting the DHS officers had given Reyes-Romero a pre-filled form. AUSA Hallowell immediately disclosed the color versions of the documents to Reyes-Romero's counsel and to the Court.

After reviewing the color copies, the District Court was "more convinced than ever" that the DHS officers' testimony was a "combination of nonsense . . . [and] lies." App. 792. And it continued to criticize the prosecution. The Court took issue, for instance, with AUSA Hallowell's repeated statements that, as an AUSA assigned to a criminal prosecution, he could not

unilaterally bind DHS to a specific course of conduct in future immigration proceedings. It also criticized the Government for not adequately "disclaim[ing]" the DHS officers' testimony:

> MR. HALLOWELL: Your Honor, we are saying that we will not rely on that testimony moving forward in this case.
>
> THE COURT: Why? Why won't you rely on it?
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> MR. HALLOWELL: Your Honor, we don't feel that that testimony can support a verdict for the Government on the first two prongs of [§ 1326(d)].
>
> THE COURT: If believed, it's legally insufficient? Or I shouldn't believe it?
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> MR. HALLOWELL: We understand that Your Honor will make the final decision as to whether that testimony could be believed or not. . . .
>
> THE COURT: Well, I understand that. I'm asking the lawyer for the United States of America, should I believe that testimony?
>
> MR. HALLOWELL: Your Honor, you should give it as much weight as you see fit.

App. 795, 797. In the Court's view, AUSA Hallowell's refusal to "take a[] position" on the testimony conflicted with his obligations as a prosecutor. App. 798–99. And the District Court suggested that the Government had moved to dismiss in "bad faith" to ensure DHS officials could use the 2011 order in future immigration proceedings against Reyes-Romero rather than instituting a new removal proceeding through service of a notice to appear (NTA). App. 822–24.

In response, the Government pointed out that months earlier, DHS officials had attempted to do just that, offering Reyes-Romero an NTA that would have led to new proceedings before an IJ rather than reinstatement of the 2011 administrative removal order. But Reyes-Romero had rejected it. He gave two reasons for having done so: a theory that the Government's choice to prosecute him for unlawful reentry precluded it from starting new removal proceedings[5] and a desire to ensure that the District Court would reach the merits of his § 1326(d) motion.

With the District Court's continued deferral of a ruling, the parties filed supplemental briefing on prejudice. Reyes-Romero's supplemental brief expanded the argument that but for the defects in his 2011 removal proceeding, there was "a reasonable likelihood," *Charleswell*, 456 F.3d at 362, that he would have received asylum, withholding of removal, or protection under the Convention Against Torture (CAT). The Government responded that Reyes-Romero was ineligible for asylum because his assault

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[5] In support, Reyes-Romero cited several district court opinions holding that if a noncitizen is prosecuted for a criminal offense and is granted pretrial release, he cannot be seized by DHS officials under an immigration detainer during the criminal proceeding. *E.g.*, *United States v. Hernandez-Bourdier*, No. 16-cr-222-2, 2017 WL 56033, at *11 (W.D. Pa. Jan. 5, 2017). That line of cases is contrary to what we and our sister circuits have had to say on the matter, *see, e.g.*, *United States v. Soriano Nunez*, 928 F.3d 240, 247–27 (3d Cir. 2019); *United States v. Lett*, 944 F.3d 467, 470–71 (2d Cir. 2019) (collecting decisions and joining the consensus), and in any event, nothing in those cases suggests the decision to bring a § 1326 prosecution forfeits DHS's right to pursue immigration proceedings against the noncitizen after the criminal prosecution ends.

conviction qualified as an aggravated felony; that he was ineligible for withholding of removal because the assault offense was a "particularly serious crime," 8 U.S.C. § 1231(b)(3)(B)(ii); and that he was not reasonably likely to prevail in seeking CAT protection or any other form of relief from removal. In his reply brief, Reyes-Romero unearthed a new argument: dicta from *Charleswell*, an early decision on § 1326(d), suggesting "[t]here may be some cases where the agency's violations of a [noncitizen's] rights [ar]e so flagrant, and the difficulty of proving prejudice so great, that prejudice may be presumed." 456 F.3d at 362 n.17 (citation omitted).

The District Court ultimately granted Reyes-Romero's § 1326(d) motion. It ruled that the I-826 and I-851 forms were "shams" and that any waiver on those forms was invalid; that, "in light of the invalid waivers," any failure to exhaust administrative remedies or seek judicial review as required by § 1326(d)(1) and (2) must be excused; that the irregularities in Reyes-Romero's removal proceeding constituted fundamental errors; and that those errors caused him prejudice, both because his claims for relief from removal were reasonably likely to succeed and because "the procedural defects were so central . . . that prejudice must be presumed" under footnote 17 of *Charleswell*. The Court therefore granted Reyes-Romero's motion to dismiss "on the merits." App. 1028. Doing so, the Court explained, would "serve[] to limit [Reyes-Romero's] exposure to future" immigration proceedings "reliant on the . . . 2011" order. App. 1031.

Given that disposition, the District Court denied as moot Reyes-Romero's pending motion for bond. But it

did not do the same with the Government's pending motion to dismiss. Instead, it took the "unusual" step, App. 1030, of proceeding to analyze the Government's motion on the merits and denying it as "clearly contrary to manifest public interest." *Id.* (quoting *In re Richards*, 213 F.3d 773, 787 (3d Cir. 2000)). The Court found that the Government's subjective motivation for its motion to dismiss was a desire to guarantee that DHS could rely on the 2011 removal order in future immigration proceedings. That motivation, it explained, "taint[ed]" the Government's effort to have the case dismissed. App. 1032–33. Similarly problematic, the Court continued, was the Government's "taking . . . a noncommittal position as to the credibility of" Officers Darji and Alicea, which the Court deemed inconsistent with the Government's duty to correct a witness's statement that is "obvious[ly]" untrue. App. 1037–38 (quoting *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974)).

The District Court thus dismissed the indictment with prejudice. The Government did not appeal the District Court's rulings on the motions to dismiss or the order of dismissal.[6]

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[6] After the dismissal, DHS officers served Reyes-Romero with an NTA, initiating new removal proceedings in Immigration Court. Before the IJ, Reyes-Romero conceded removability but applied for asylum, withholding of removal, CAT relief, and cancellation of removal. The IJ denied his applications and ordered him removed, and the Board of Immigration Appeals (BIA) dismissed his appeal. His petition for review before the Sixth Circuit remains pending. *Reyes-Romero v. Barr*, No. 19-03784 (6th Cir. Aug. 15, 2019).

C. Hyde Amendment Application

Following that dismissal, Reyes-Romero timely applied to the District Court for attorney's fees and costs under the Hyde Amendment.[7] Relying heavily on the findings in the Court's opinion resolving the parties' motions to dismiss, Reyes-Romero argued the Government had pursued an "egregious" prosecution that was "vexatious, frivolous, [and] in bad faith." App. 1052–53 (citation omitted).

The District Court awarded Reyes-Romero fees and costs, a decision it reached in five steps: First, because the Government did not appeal the order resolving the motions to dismiss, the Court deemed any "findings and conclusions in that . . . Opinion and Order final." App. 4. Second, the Court determined that in assessing "the position of the United States," 18 U.S.C. § 3006A app., it would consider not only "the litigation position of the [Department of Justice (DOJ)] through th[e] . . . U.S. Attorney's Office" but also "the actions taken (or not taken) by the federal agency upon which the criminal case is based"—that is, DHS, including "the actions of DHS Officers in 2011." App. 26–27. Third, borrowing a phrase used in the indictment, the

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[7] Hyde Amendment awards are subject to "the procedures and limitations . . . under section 2412 of title 28," 18 U.S.C. § 3006A app., one of which is that the application must be filed "within thirty days of final judgment," 28 U.S.C. § 2412(d)(1)(B). That thirty-day deadline "begins when the government's right to appeal the order has lapsed." *Johnson v. Gonzales*, 416 F.3d 205, 208 (3d Cir. 2005) (citation omitted). Here, the District Court granted Reyes-Romero's motion to dismiss the indictment on July 2, 2018; the Government's window to appeal closed on August 1, 2018, *see* Fed. R. App. P. 4(b)(1)(B); and Reyes-Romero moved for a Hyde Amendment award on August 7, 2018.

Court deemed the deficiencies in Reyes-Romero's immigration forms so apparent that it was "frivolous" for the Government to prosecute him on the ground that he "had been previously . . . removed from the United States *pursuant to law*." App. 31 (citation omitted). Fourth, although the Court acknowledged that the Government's arguments on § 1326(d)(3)'s prejudice requirement "did not brush up against any prosecutorial misconduct" and "were largely reasonable and based in law," it reasoned that "this 'good' . . . [does not] sufficiently outweigh[] the 'bad.'" App. 42. Finally, the Court found that the Government's behavior "before and during the criminal prosecution . . . demonstrated conscious wrongdoing," making the prosecution one brought "in bad faith" under the Amendment. App. 28. So the Court ordered the Government to pay Reyes-Romero's costs and attorney's fees, which it later calculated as $73,757.00. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291. Despite a circuit conflict over whether an appeal from a Hyde Amendment application is civil or criminal for purposes of Federal Rule of Appellate Procedure 4, *compare, e.g.*, *United States v. Truesdale*, 211 F.3d 898, 902–04 (5th Cir. 2000) (civil), *with, e.g.*, *United States v. Robbins*, 179 F.3d 1268, 1269–70 (10th Cir. 1999) (criminal), we are assured of our jurisdiction and need not decide the issue because Reyes-Romero's notice of appeal was timely filed even under Rule 4(b)'s shorter deadline. *See United States v. True*, 250 F.3d 410, 421 n.8 (6th Cir. 2001) (taking this approach).

We review a Hyde Amendment award for abuse of discretion, *United States v. Manzo*, 712 F.3d 805, 809–10 (3d Cir. 2013), "which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law[,] or an improper application of law to fact," *Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178, 182 n.1 (3d Cir. 2019) (citation omitted).

III. DISCUSSION

A defendant seeking fees and costs under the Hyde Amendment bears the burden, *United States v. Manzo*, 712 F.3d 805, 810 (3d Cir. 2013), of showing that the "position of the United States was vexatious, frivolous, or in bad faith," Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (codified at 18 U.S.C. § 3006A app.). Those grounds for a cost- and fee-shifting award were "curtailed significantly" from those in the more permissive Equal Access to Justice Act (EAJA) provision on which the Hyde Amendment was generally modeled. *United States v. Gilbert*, 198 F.3d 1293, 1302–03 (11th Cir. 1999). As a result, a criminal defendant seeking costs and fees under the Hyde Amendment faces a "daunting obstacle." *Manzo*, 712 F.3d at 810 (quoting *United States v. Isaiah*, 434 F.3d 513, 519 (6th Cir. 2006)).

That obstacle is insurmountable here. Although Reyes-Romero attempts to limit our review, contending that the District Court's previous fact-finding is preclusive and that the Government has waived several of its arguments, we conclude those attempts are futile. And once we assess the complete record, we perceive no basis for a Hyde Amendment award. From the inception of the prosecution and

throughout the extensive briefing and hearings, the Government had objectively reasonable arguments that Reyes-Romero was not prejudiced by errors in his 2011 removal proceeding and thus could not prevail on his § 1326(d) challenge. The Government's position, therefore, was not frivolous—a high bar requiring that the prosecution be "utterly without foundation in law or fact." *United States v. Monson*, 636 F.3d 435, 440 (8th Cir. 2011) (citation omitted). Nor was the prosecution brought or maintained in bad faith—an equally high bar requiring an objective showing of "dishonest purpose or moral obliquity." *Manzo*, 712 F.3d at 811 (quoting *Gilbert*, 198 F.3d at 1299). Below, we address issue preclusion and waiver before turning to the merits of the Hyde Amendment application.

A. Threshold Issues

Reyes-Romero does not defend the District Court's decision directly. Instead, he advances two arguments that, if accepted, would restrict our review of the bases for that decision. Neither is persuasive.

1. Issue preclusion

Reyes-Romero contends that findings and conclusions in the District Court's opinion resolving the parties' motions to dismiss were rendered "final and binding" by the Government's decision to appeal not those rulings but only the award of fees and costs. Appellee's Br. 1. In support, he cites cases involving the doctrine of issue preclusion, which holds that "a prior judgment . . . foreclose[es] successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019) (alterations in original) (citation omitted). But

issue preclusion does not apply here for three independent reasons.

First, as Reyes-Romero recognizes, issue preclusion applies only "in a subsequent action." Appellee's Br. 9 (quoting 1 Restatement (Second) of Judgments § 27 (Am. Law Inst. 1982)); *see United States ex rel. Doe v. Heart Sol., PC*, 923 F.3d 308, 316 (3d Cir. 2019) (requiring that the issues be resolved in an "earlier case" (quoting *Allen v. McCurry*, 449 U.S. 90, 95 (1980))); *Hawksbill Sea Turtle v. FEMA*, 126 F.3d 461, 474 (3d Cir. 1997) (requiring that they be "decided in a previous action"); *see also United States v. Briseno*, 843 F.3d 264, 270 (7th Cir. 2016) (noting that issue preclusion "applies to rulings in different *proceedings*, and not simply different *stages* within the same proceeding"). "Relitigation of issues previously determined in the *same* litigation," on the other hand, "is controlled by principles of the law of the case doctrine rather than [issue preclusion]." *Hull v. Freeman*, 991 F.2d 86, 90 (3d Cir. 1993) (emphasis added).

Reyes-Romero's criminal prosecution and Hyde Amendment application are, at least for these purposes, part of the "same litigation," *Hull*, 991 F.2d at 90. The Amendment authorizes fee-shifting "*in* . . . criminal case[s]," 18 U.S.C. § 3006A app. (emphasis added), and an application must be submitted "within thirty days of final judgment," 28 U.S.C. § 2412(d)(1)(B); *see* 18 U.S.C. § 3006A app. Although the issues involved in deciding a defendant's guilt or innocence and those involved in a Hyde Amendment application are not identical, the latter flow directly from the former. An application for attorney's fees and costs under the Amendment, therefore, is merely a

"different stage[] within the same proceeding," *Briseno*, 843 F.3d at 270 (emphasis omitted). So under *Hull*, if the District Court's previous findings are to have binding effect, that effect must flow not from issue preclusion, but from the law-of-the-case doctrine.

That doctrine, however, is of no help to Reyes-Romero because "[a]n appellate court's function *is* to revisit matters decided in the trial court." *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016). As a result, we are "not bound by district court rulings under the law-of-the-case doctrine," *id.*; *see Koppers Co. v. Aetna Cas. & Sur. Co.*, 158 F.3d 170, 173 n.4 (3d Cir. 1998) ("[T]he district court's reference to 'law of the case' cannot bind this Court on appeal."), and we owe no deference—beyond what the clear error standard of review demands—to findings in the District Court's previous opinion.

Second, issue preclusion "cannot apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate that issue." *Heart Sol.*, 923 F.3d at 316 (quoting *Allen*, 449 U.S. at 95). Without an "incentive to obtain a full and fair adjudication" of an issue, a party will not be bound by the court's resolution of it. 1 Restatement (Second) of Judgments § 28(5).

Here, however, the Government had no incentive to contest the District Court's findings or appeal its gratuitous denial of the Government's motion to dismiss. By the time the District Court resolved the parties' motions to dismiss, the Government had long disclaimed reliance on the DHS officers' testimony and abandoned any argument on § 1326(d)'s exhaustion or judicial-review prongs. And given that the

Government had *agreed* the prosecution should be dismissed, it comes as no surprise that it chose not to appeal the Court's order of dismissal. We cannot impute to the Government an "incentive to . . . adjudicat[e]," 1 Restatement (Second) of Judgments § 28(5), factual findings made en route to a disposition it sought. Nor would it be prudent to do so, as a contrary rule "would force the [Government] to abandon . . . prudential concerns and to appeal every adverse decision in order to avoid foreclosing further review," *United States v. Mendoza*, 464 U.S. 154, 161 (1984), of any issues that might bear on a Hyde Amendment application.

Third, issue preclusion applies only where the issue in question was "essential to the prior judgment." *Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n*, 342 F.3d 242, 252 (3d Cir. 2003) (citation omitted). That limitation "is rooted in principles of fairness" and "ensures that preclusive effect is not given to determinations that did not receive close judicial attention . . . or that were unappealable by virtue of being incidental to a decision." *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 250 (3d Cir. 2006) (internal quotation marks and citation omitted). In defining whether an issue was "essential," we ask whether it "was critical to the judgment or merely dicta." *O'Leary v. Liberty Mut. Ins. Co.*, 923 F.2d 1062, 1067 (3d Cir. 1991).

The findings on which Reyes-Romero relies were not "critical to the judgment," *O'Leary*, 923 F.3d at 1067, and thus are not entitled to preclusive effect. The dispositive parts of the District Court's opinion were its determinations that Reyes-Romero had satisfied each of the prongs of § 1326(d), which together entitled

him to dismissal of the indictment. But none of those prongs demanded an assessment of prosecutorial motives: Section 1326(d) focuses on exhaustion, judicial review, and fundamental unfairness in relation to underlying removal proceedings, and the Government's motivation in bringing or maintaining a prosecution years later has no bearing on those issues.[8] Nor does the District Court's decision to address and deny the Government's motion to dismiss give rise to preclusion. Indeed, once the Court granted Reyes-Romero's § 1326(d) motion on the merits, the Government's own motion to dismiss became moot—a dynamic the District Court recognized with respect to the issue of release on bond—so the Court's ruling on that motion and attendant findings were, in any event, beyond its jurisdiction.[9]

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[8] Nor do the findings related to the immigration officers' misconduct in 2011 have preclusive effect because they contributed to the District Court's determination that Reyes-Romero had satisfied § 1326(d)'s exhaustion and judicial-review requirements. That is because, even beyond what we have already explained, issue preclusion applies only where the issue is "the same as that involved in the prior action." *Karns v. Shanahan*, 879 F.3d 504, 514 n.3 (3d Cir. 2018) (citation omitted). Here, however, there is a "lack of total identity," 1 Restatement (Second) of Judgments § 27 cmt. c, between a finding of misconduct as related to the § 1326(d) affirmative defense and a finding of misconduct as it bears on whether the government's litigation position was in bad faith under the Hyde Amendment.

[9] We briefly address and reject two additional arguments. First, we have held "that independently sufficient alternative findings should be given preclusive effect" even where those findings "do not fulfill the necessity requirement . . . in a strict sense." *Jean Alexander Cosmetics*, 458 F.3d at 255. But comments made in the course of denying the Government's motion to dismiss cannot be viewed as alternative bases for the

For these reasons, we reject Reyes-Romero's argument that we are bound by findings or conclusions in the District Court's previous order.

2. Waiver

Of course, even if our review is not limited by issue preclusion or the law of the case, it "may well be constrained by other doctrines such as waiver [or] forfeiture." *Musacchio*, 136 S. Ct. at 716. Reyes-Romero seizes on those doctrines, arguing that the Government waived several arguments it advances on appeal by not pressing them before the District Court at the Hyde Amendment stage. We disagree.

Reyes-Romero identifies only two arguments he contends are waived: (i) that the delayed production of color copies of Reyes-Romero's immigration forms was a "snafu" attributable to Reyes-Romero's counsel's failure "to inspect the originals," Appellant's Br. 48; and (ii) that the District Court's finding that Officer Darji had lied under oath hinged on a "misread[ing]" of his testimony,[10] *id.* at 45. Reyes-Romero is correct in a limited sense: Those arguments do not appear in

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result here, which was a dismissal of the indictment. Second, although we have recognized that district courts have an "independent responsibilit[y]" to examine whether a Rule 48 motion to dismiss is "clearly contrary to manifest public interest," App. 1030–31 (quoting *In re Richards*, 213 F.3d 773, 787–88 (3d Cir. 2000)), we have never suggested that responsibility extends where the court has already granted a defendant's separate motion to dismiss on the merits, leaving it with no live controversy with respect to the government's motion.

[10] Although Reyes-Romero's brief identifies a third argument—that Reyes-Romero "wanted to drop his claim for asylum," Appellee's Br. 13 (citing Appellant's Br. 53)—a review of the Government's brief reveals no such argument.

the Government's response to his Hyde Amendment application. And at least as a general matter, "[a]rguments not raised in the district courts are waived on appeal," *United States v. Tyler*, 956 F.3d 116, 124 n.9 (3d Cir. 2020), such that we cannot consider them "absent exceptional circumstances," *United States v. James*, 955 F.3d 336, 345 (3d Cir. 2020) (citation omitted).

But our case law does not require parties to relitigate previously decided issues before the district court where doing so "would be an exercise in wasteful formality." *United States v. Hoffecker*, 530 F.3d 137, 165 (3d Cir. 2008) (citation omitted); *see Chassen v. Fidelity Nat'l Fin., Inc.*, 836 F.3d 291, 293 (3d Cir. 2016) ("[A] litigant [need not] engage in futile gestures merely to avoid a claim of waiver." (second alteration in original) (citation omitted)). Here, by the time the District Court had ruled on the parties' motions to dismiss and Reyes-Romero had applied for costs and fees, the Court's views on the prosecutor's conduct and the DHS officers' candor were beyond doubt, and relitigating them would have been nothing more than a "futile gesture[]," *Chassen*, 836 F.3d at 293. Faced with a court "more convinced than ever" on those points, App. 792, the Government's choice not to relitigate them was therefore reasonable and did not constitute waiver or forfeiture.

B. Merits of the Hyde Amendment Application

Having dispensed with those threshold issues, we now turn to the merits of the Hyde Amendment award. For the reasons we explain below, we conclude that AUSA Hallowell, acting on behalf of the Government,

satisfied the high ethical and professional standards to which we hold prosecutors, and the District Court mistakenly extrapolated from errors on the part of DHS to make findings about the prosecution that the record cannot support.

We start with two clarifications about the applicable legal framework and then explain why the Government's position was neither frivolous nor in bad faith.[11]

1. The applicable legal framework

The Hyde Amendment applies where, "in a[] criminal case[,] . . . the position of the United States was vexatious, frivolous, or in bad faith." 18 U.S.C. § 3006A app. The District Court examined a wealth of case law on the Amendment and accurately summarized much of the applicable legal framework. But we must clarify two aspects of that framework at the outset, one concerning "the position of the United States" and the other the requirement that that position be "vexatious, frivolous, or in bad faith."

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[11] Although Reyes-Romero argued in the District Court that the Government's position was also vexatious, the Court found only frivolousness and bad faith, and Reyes-Romero has not specifically argued vexatiousness on appeal. To the extent that argument is implicit in his others, however, we reject it on the same grounds. Vexatiousness embodies two elements: (i) "that the criminal case was objectively deficient, in that it lacked either legal merit or factual foundation"; and (ii) "that the government's conduct, when viewed objectively, manifests maliciousness or an intent to harass or annoy." *Manzo*, 712 F.3d at 810 (citation omitted). The former roughly corresponds to frivolousness and the latter to bad faith, so our analysis here essentially covers all three grounds for a Hyde Amendment award.

i. The meaning of "position of the United States"

Notwithstanding its reference to "the position of the United States," 18 U.S.C. § 3006A app., the Hyde Amendment is not a tool to combat misconduct by the federal government writ large. It applies only "in a[] criminal case," *id.*, which directs us to focus on "the government's position *underlying the prosecution*," *Manzo*, 712 F.3d at 810 (emphasis added) (quoting *Gilbert*, 198 F.3d at 1299). The Amendment thus reaches "prosecutorial misconduct" affecting the "case as an inclusive whole," *id.* (citations omitted), not misconduct in distinct government proceedings nor isolated "errors" by individual law enforcement officers in the course of the investigation or prosecution, *id.* at 813.

Our sister circuits share that view. The Second Circuit, for instance, reads "the position of the United States" for Hyde Amendment purposes "to mean . . . the government's general litigation stance: its reasons for bringing a prosecution, its characterization of the facts, and its legal arguments." *United States v. Bove*, 888 F.3d 606, 608 (2d Cir. 2018). The Ninth Circuit reads the Amendment as requiring an assessment of "the government's litigating position as a whole," not of "other types of bad conduct by government employees during the course of an investigation." *United States v. Mixon*, 930 F.3d 1107, 1111 (9th Cir. 2019); *see id.* at 1112 (requiring "serious misconduct *on the part of prosecutors*" (emphasis added)). Several others have agreed, *see, e.g.*, *Monson*, 636 F.3d at 439–40 (holding that a ruling for the defendant under *Franks v. Delaware*, 438 U.S. 154 (1978), which "constitutes a finding that law enforcement

deliberately lied or recklessly disregarded the truth," "does not necessarily mean that . . . the prosecution against the defendant was frivolous or vexatious"), and we are aware of no precedential appellate decision taking a different approach.

In sum: The Hyde Amendment demands we "[f]ocus[] on the *prosecutors*' conduct," *Monson*, 636 F.3d at 439 (emphasis added), and ask whether the alleged prosecutorial misconduct was so "pervasive" as to "render the government's litigating position *as a whole* vexatious, frivolous, or in bad faith," *Mixon*, 930 F.3d at 1112 (emphasis added).

The District Court, however, understood the "position of the United States," 18 U.S.C. § 3006A app., to include *both* "the litigation position of the DOJ through th[e] . . . U.S. Attorney's Office *and* the actions taken (or not taken) by" DHS officers, App. 26 (emphasis added), including as far back as Reyes-Romero's administrative removal proceeding in 2011. In assessing Reyes-Romero's Hyde Amendment application, for example, the Court found that DHS officers "railroaded [him] out of the country in 2011" in a manner that was "lacking in any reasonable factual or legal basis" and was therefore frivolous, App. 28–29, and that the officers' testimony in 2018 "demonstrate[d] clear bad faith" on their part, App. 29.

That understanding was mistaken. It assumes that, because the EAJA's "procedures and limitations" are incorporated into the Hyde Amendment, 18 U.S.C. § 3006A app., and because the EAJA defines "position of the United States" to include, "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which

the civil action is based," 28 U.S.C. § 2412(d)(2)(D), the Hyde Amendment must also incorporate that definition. But the EAJA's substantive definition of "position of the United States" is neither a "procedure[]" nor a "limitation[]," so it cannot be read into the Hyde Amendment.

And there are good reasons not to compare EAJA apples to Hyde Amendment oranges. For one thing, we took a contrary view in *Manzo*, emphasizing "the government's position *underlying the prosecution*" and asking whether it was "objectively []reasonable for the government to attempt to prosecute" the defendant. 712 F.3d at 810, 813 (emphasis added) (citation omitted); *see also, e.g.*, *Mixon*, 930 F.3d at 1111 (defining "position of the United States" under the Hyde Amendment without reference to the EAJA definition); *Bove*, 888 F.3d at 608 & n.10 (noting that the phrase "position of the United States" "cannot mean precisely the same thing in both" the Hyde Amendment and the EAJA). For another, the EAJA covers a much broader swath of litigation, including civil actions arising from agency enforcement or adjudication. *See* 28 U.S.C. § 2412(a)(1); *see also Taylor v. Heckler*, 835 F.2d 1037, 1040 (3d Cir. 1987) (under the EAJA, the "position of the United States" necessarily includes "not only the litigation position . . . but also the agency position [that] made the lawsuit necessary" (alterations in original) (citation omitted)). Yet a criminal prosecution for unlawful reentry does not fit that paradigm: Although a previous removal order is "a necessary element to the [§ 1326] charge," App. 27, the criminal prosecution is distinct from and collateral to the immigration proceeding that led to the order and thus unlike

agency enforcement actions that directly lead to civil actions in federal court. For these reasons,[12] we reaffirm the principles set out in *Manzo* and hold that the "position of the United States" for purposes of the Hyde Amendment refers only to the position taken by the department and officers charged with

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[12] In interpreting the "position of the United States" to include actions of DHS and its officers, the District Court also cited two out-of-circuit district court opinions—*United States v. Holland*, 34 F. Supp. 2d 346 (E.D. Va. 1999), and *United States v. Gardner*, 23 F. Supp. 2d 1283 (N.D. Okla. 1998)—both of which were decided before we or many of our sister circuits had a chance to construe the Amendment. In *Holland*, the court considered the defendants' application for costs and fees to flow not from the Hyde Amendment as bounded by the "procedures and limitations" of § 2412(d), but from a distinct open-ended EAJA provision holding the United States "liable for such fees and expenses to the same extent that any other party would be liable under the common law," 18 U.S.C. § 2412(b). *See* 34 F. Supp. 2d at 356–59. As the District Court recognized elsewhere in its opinion, *Holland*'s analysis deviates from the "consensus among circuits that the Hyde Amendment incorporates only those procedures and limitations in subpart (d)." App. 25. And although the *Holland* court originally found "vexatious misconduct" on the part of the Federal Deposit Insurance Corporation (FDIC) as well as DOJ, it later vacated that portion of its award after concluding the FDIC had lacked "sufficient notice that . . . fees and litigation expenses might be assessed against it." *United States v. Holland*, 48 F. Supp. 2d 571, 581 (E.D. Va. 1999). In *Gardner*, the district court ruled that the EAJA's broad definition of "position of the United States" is a "procedure or limitation incorporated into the Hyde Amendment" and therefore that executive agencies like the Internal Revenue Service can be swept into that definition. 23 F. Supp. 2d at 1293–95. But that analysis was not based on a rigorous analysis of the Amendment's statutory text, has never been cited favorably by any court of appeals, and is contrary to both *Manzo* and our conclusion today.

administering the prosecution—here, DOJ and AUSA Hallowell.

To be clear, misconduct by law enforcement officers or other executive departments can be *relevant* to a Hyde Amendment application if prosecutors leverage that misconduct to further a prosecution that has no factual or legal basis or that is brought for purposes of harassment. But because the Amendment is concerned only with prosecutorial misconduct, *see Mixon*, 930 F.3d at 1112 ("A defendant is not entitled to attorneys' fees under the Hyde Amendment due to law enforcement misconduct; rather, the focus is on the prosecutors . . . ."), alleged misconduct by DHS or its officers cannot independently create liability for attorney's fees and costs.

ii. The meaning of "vexatious, frivolous, or in bad faith"

The Hyde Amendment applies where the Government's litigation position "was vexatious, frivolous, *or* in bad faith." 18 U.S.C. § 3006A app. (emphasis added). We have taken the Amendment's use of the disjunctive "or" to mean that each ground must be assessed separately, *see Manzo*, 712 F.3d at 810–11 (laying out different standards for each), and several of our sister circuits agree, *see, e.g.*, *Monson*, 636 F.3d at 438–39; *United States v. Manchester Farming P'ship*, 315 F.3d 1176, 1182 (9th Cir. 2003). While the three grounds meaningfully "overlap," *United States v. Terzakis*, 854 F.3d 951, 955, 956 n.3 (7th Cir. 2017), analyzing each on its own helps courts focus only on relevant factors and not on a nebulous sense of government impropriety.

When we conduct that analysis on this record and consider the Hyde Amendment case law on frivolousness and bad faith, we conclude Reyes-Romero is not entitled to an award.

2. The position of the United States was not frivolous

We and our sister circuits have laid extensive groundwork for analyzing frivolousness under the Hyde Amendment. For the Government's position to be frivolous, the prosecution it pursues must be "groundless[,] with little prospect of success." *Manzo*, 712 F.3d at 810 (alteration in original) (quoting *Gilbert*, 198 F.3d at 1299). Said differently, the position must be "foreclosed by binding precedent or . . . obviously wrong," *id.* at 811 (quoting *United States v. Capener*, 608 F.3d 392, 401 (9th Cir. 2010)), and a prosecution based on an unresolved but reasonable legal argument cannot be frivolous, *id.* *See Bove*, 888 F.3d at 608 (frivolousness requires a prosecution that is "[m]anifestly insufficient or futile" (alteration in original) (citation omitted)); *Monson*, 636 F.3d at 440 (to be frivolous, a prosecution must be "utterly without foundation in law or fact" (citation omitted)). In assessing frivolousness, therefore, we view the prosecution through the lens of the elements of the criminal charge and the evidence required to satisfy those elements.

We also find guidance in Hyde Amendment case law addressing vexatiousness, which—though a distinct ground for awarding fees, *see supra* note 11—overlaps with frivolousness to the extent it too requires that the prosecution be "objectively deficient, [meaning] lack[ing] [in] either legal merit or factual foundation."

Manzo, 712 F.3d at 810. In *Manzo*, for instance, the defendant argued the government had made "blatantly false" allegations about his receipt of a cash bribe. *Id.* at 812. In that decision, we assumed he had not received the cash and that the government had knowingly presented false testimony. *See id.* Even so, we explained, the charges against the defendant "did not require the government to prove that he physically received a cash bribe," and because the government could "plausibly argue that Manzo was aware of the cash payment . . . and played a role in facilitating it," it maintained a viable—and thus objectively nonfrivolous—pathway to conviction. *See id.*

Manzo controls here. Reyes-Romero did not contest either element required for conviction under § 1326(a)—that he was removed and later found in the country without the Attorney General's consent. Rather, he sought to attack the removal order collaterally under § 1326(d), which we have treated as akin to an affirmative defense. *See Richardson v. United States*, 558 F.3d 216, 222 (3d Cir. 2009); *United States v. Charleswell*, 456 F.3d 347, 358 (3d Cir. 2006). Yet at every point in the prosecution, from the return of the indictment through the decision resolving the parties' motions to dismiss, the Government had—at minimum—a reasonable argument that Reyes-Romero could not show prejudice under § 1326(d)(3) and thus could not make out the affirmative defense. The District Court even recognized as much, characterizing the Government's position on prejudice as "largely reasonable and based in law." App. 42.

We agree with the characterization of the Government's prejudice arguments as reasonable and based in law, and we briefly highlight some of the

complexities on which those arguments turned. The first was whether Reyes-Romero's conviction qualified as a "crime of violence," 8 U.S.C. § 1101(a)(43)(F) (incorporating 18 U.S.C. § 16's definition), and thus an aggravated felony rendering him ineligible for asylum, *id.* § 1158(b)(2)(A)(ii), (B)(i), and cancellation of removal, *id.* § 1229b(a)(3). Although § 16(b)'s residual clause has been held void for vagueness, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210 (2018); *Baptiste v. Att'y Gen.*, 841 F.3d 601, 615–21 (3d Cir. 2016), those decisions were not in place in 2011, and the Government argued prejudice must be assessed as of the underlying removal proceedings rather than as of the collateral challenge to those proceedings. Even setting § 16(b) aside, Reyes-Romero would remain ineligible for asylum and cancellation if his offense fit within § 16(a)'s elements clause, which in turn depended on whether an offense capable of commission through reckless conduct can satisfy that clause—a difficult and open question the Supreme Court recently agreed to resolve, *see supra* note 3. A related question was whether Reyes-Romero's offense qualified as a "particularly serious crime" rendering him ineligible for withholding of removal, 8 U.S.C. § 1231(b)(3)(B)(ii). At the time of his removal, our precedent held "that an offense must be an aggravated felony in order to be classified as a 'particularly serious crime.'" *Alaka v. Att'y Gen.*, 456 F.3d 88, 105 (3d Cir. 2006). But we have since revisited *Alaka*, holding that "the phrase 'particularly serious crime' . . . includes but is not limited to aggravated felonies." *Bastardo Vale v. Att'y Gen.*, 934 F.3d 255, 266–67 (3d Cir. 2019) (en banc). And the notion that second-degree aggravated assault under New Jersey law could have

qualified as particularly serious was not out of the question. *See, e.g.*, *Aguilar v. Att'y Gen.*, 665 F. App'x 184, 185–86, 188–89 (3d Cir. 2016) (per curiam) (upholding the BIA's designation of that offense as particularly serious).[13]

We need not review every step in the District Court's analysis. It is enough to say we agree that whatever the merits of Reyes-Romero's arguments on prejudice, the Government's arguments in response were "reasonable and based in law," App. 42—or, put another way, were far from "foreclosed by binding precedent or . . . obviously wrong," *Manzo*, 712 F.3d at 811 (citation omitted). As a result, the Government at all times maintained a viable path to conviction, making its litigation position nonfrivolous under the Hyde Amendment.

Reyes-Romero argues to the contrary, urging us to accept the District Court's reasoning. We address each argument below.

We start with language from Reyes-Romero's indictment stating that he had been "removed from

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[13] There is also the matter of Reyes-Romero's evidence showing fear of persecution or torture if returned to El Salvador. The District Court concluded Reyes-Romero had shown a reasonable likelihood of obtaining relief from removal, but it did so only after an extensive review of the evidence and the case law, and only after reaching favorable conclusions on close issues such as the cognizability of Reyes-Romero's family unit as a particular social group, the relevance of incidents that took place in Honduras, and whether the private violence he feared would qualify as torture for CAT protection. That both the IJ and BIA in Reyes-Romero's subsequent removal proceeding rejected his applications for relief from removal, *see supra* note 6, further suggests the Government's arguments were not beyond the pale.

the United States *pursuant to law*." App. 31 (quoting App. 63). Reyes-Romero seizes on that language, arguing that if a removal proceeding violated DHS's rules or a noncitizen's rights, the noncitizen was not removed "pursuant to law" and thus cannot be prosecuted for unlawful reentry regardless whether he can show that those errors caused him prejudice. But that argument runs aground on our precedent, which holds that "prejudice is a necessary component under [§] 1326(d)(3)." *Charleswell*, 456 F.3d at 358. In plain terms, a criminal defendant who concedes the elements of § 1326(a) but cannot satisfy § 1326(d)(3)'s prejudice requirement—which, we have held, generally requires a showing of "a reasonable likelihood that the result would have been different if the error in the [removal] proceeding had not occurred," *id.* at 362 (citation omitted)—is guilty of unlawful reentry, and the Government's prosecution of that charge cannot be "groundless," *Manzo*, 712 F.3d at 810 (citation omitted).

Reyes-Romero's argument to the contrary is essentially that when a defendant has a good case on some but not all the elements of an affirmative defense, the Government must concede the rest and consent to dismissal on his terms. That simply is not the law. Although our criminal justice system depends on prosecutors' discretion to decide which cases to pursue, their choice to pursue an objectively valid prosecution is immune from scrutiny by the federal courts. Put another way, our "constitutional framework" is such that "we cannot read the Hyde Amendment to license judicial second-guessing of prosecutions that are objectively reasonable," *United*

States v. Shaygan, 652 F.3d 1297, 1314 (11th Cir. 2011)—as this prosecution undoubtedly was.

Nor was the Government bound to abandon the prosecution because it shined a light on an administrative removal proceeding that, as the Government acknowledges, was something of a "botched job." Arg. Tr. 15. To the contrary, "[i]t is the responsibility of the Department of Justice to enforce the law vigorously[,] and it cannot abdicate this duty because of possible embarrassment to other agencies of the government." U.S. Dep't of Justice, Justice Manual § 9-2.159 (2018), https://www.justice.gov/jm/justice-manual. Despite signs that DHS might have mishandled Reyes-Romero's administrative removal, AUSA Hallowell nonetheless maintained a nonfrivolous pathway to conviction throughout the prosecution, and under those circumstances we cannot fault him or the office he represents for continuing to seek such a conviction.

As a last resort, Reyes-Romero suggests we deem the prosecution frivolous because prejudice must be "presume[d]." Arg. Tr. 31–32. He relies for this proposition on *Charleswell*, where we stated that "some procedural defects may be so central or core to a proceeding's legitimacy, . . . and the difficulty of proving prejudice so great[,] that prejudice may be presumed." 456 F.3d at 362 n.17 (internal quotation marks and citation omitted).

That language, however, is dicta in a footnote. We have never given effect to the possibility we left open in *Charleswell*, nor (to our knowledge) has any other court of appeals. Nor need we address that possibility today; the point, rather, is that where no appellate

court has so held to date, we cannot say the Government lacked a "reasonable legal basis" for contending § 1326(d)(3)'s prejudice prong could not be satisfied. *Manzo*, 712 F.3d at 811 (citation omitted); *see id.* ("The government should be allowed to base a prosecution on a novel argument, so long as it is a reasonable one, without fear that it might be setting itself up for liability under the Hyde Amendment." (citation omitted)). It would also be especially perverse to fault the Government for ignoring this possibility here given that Reyes-Romero—who carries the burden on each of § 1326(d)'s elements—failed to mention it until his supplemental reply brief filed months after his initial § 1326(d) motion.

In sum, the Government at all times had a legally defensible and factually supported basis for prosecuting Reyes-Romero for unlawful reentry. The "position of the United States," 18 U.S.C. § 3006A app., therefore, was not frivolous.[14]

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[14] In analyzing a Hyde Amendment application, the district court's task is to "make only one finding . . . based on the case as an inclusive whole" rather than engaging in "[a] count-by-count analysis." *Manzo*, 712 F.3d at 810 (citation omitted). Here, that task is straightforward because Reyes-Romero was charged with only one offense. We therefore have no occasion to address the implications of a multicount prosecution where only one or some counts are viable. *Cf. United States v. Heavrin*, 330 F.3d 723, 730 (6th Cir. 2003) (noting that a Hyde Amendment award may be appropriate "[e]ven if the district court determines that part of the government's case has merit" so long as "the government's 'position' as a whole was vexatious, frivolous, or in bad faith").

3. The position of the United States was not in bad faith

Nor did the Government initiate or prolong Reyes-Romero's criminal prosecution in bad faith.

On this issue, too, we benefit from a well-developed line of precedent. Bad faith requires more than "bad judgment or negligence"; it demands "the conscious doing of a wrong because of dishonest purpose or moral obliquity." *Manzo*, 712 F.3d at 811. And in assessing whether the "position of the United States was . . . in bad faith," 18 U.S.C. § 3006A app., we may not "delve into the minds and motivations of individual prosecutors," *Manzo*, 712 F.3d at 813. Instead, we must "engage in an objective inquiry," *Manzo*, 712 F.3d at 811 (citing *Shaygan*, 652 F.3d at 1313–14), asking whether "[u]nder th[e] circumstances" the government's litigation strategy was "objectively unreasonable" in light of the facts and "binding case law." *Id.* at 813. And in doing so, we must be wary to leave prosecutors the breathing space necessary to pursue justice with vigor. A Hyde Amendment award is not available simply because a defendant was acquitted or because the government engaged in "contentious and hard-fought" litigation tactics. *United States v. Schneider*, 395 F.3d 78, 88 (2d Cir. 2005). To the contrary, "government attorneys are entitled to be zealous advocates of the law on behalf of the . . . people of the United States," and "[w]hile a prosecutor is not at liberty to strike foul blows, he may strike hard ones . . . —indeed, he should." *United States v. Knott*, 256 F.3d 20, 29 (1st Cir. 2001) (internal quotation marks and citation omitted).

The District Court identified seven points throughout the prosecution that in its view constituted "evidence of bad faith," App. 36, on the part of AUSA Hallowell and, by extension, DOJ. We address them one by one. Although we generally owe deference to factual findings, any finding that "is implausible based on the record" is clearly erroneous and thus "unsustainable." *Capener*, 608 F.3d at 403; *see United States v. Heavrin*, 330 F.3d 723, 727 (6th Cir. 2003) (reversal of a Hyde Amendment award is required where the reviewing court is left with "a definite and firm conviction" that "a mistake has been made" (citation omitted)).

i. Obtaining the indictment

First, we disagree that the Government relied on "facially invalid waivers," App. 31, to seek an indictment and proceed with the prosecution against Reyes-Romero. Even if we were to accept that the Government was "mistaken at the time of [the] [i]ndictment," App. 31, "the Hyde Amendment [is] targeted at prosecutorial misconduct, not prosecutorial mistake," *Capener*, 608 F.3d at 401 (alteration in original) (citation omitted). And here, the contents of Reyes-Romero's A-file gave the Government probable cause to believe that he fell within the facial elements of the § 1326(a) offense. Although a defendant in Reyes-Romero's position may bring a collateral challenge under § 1326(d), that challenge is akin to an affirmative defense, and it is up to the defendant to assert and prove it. That defense does not turn on whether the removal was "pursuant to law," App. 31; it requires (among other things) prejudice, *Charleswell*, 456 F.3d at 358, and there was nothing in the A-file to suggest Reyes-Romero could

show a reasonable likelihood of any outcome other than removal. When viewed objectively, therefore, the decision to indict and prosecute Reyes-Romero does not give rise to an inference of bad faith.

ii. The DHS officers' testimony

Nor are we persuaded that Officers Darji and Alicea gave false testimony or that the Government's refusal to label it as such violated its obligations under *Napue v. Illinois*, 360 U.S. 264 (1959).

We start with the most frequently quoted portion of the testimony: Officer Darji's acknowledgment that the forms in Reyes-Romero's A-file did not "make any sense." App. 331. It is not the case that Officer Darji "admitted on the stand that *his testimony* (given just moments before) was, in fact, nonsense." App. 32 (emphasis added). Officer Darji had no specific memory of Reyes-Romero's proceeding, and thus offered testimony only about the "normal practice" in his DHS unit, App. 319. In the leadup to Officer Darji's oft-quoted admission, the District Court took over questioning and presented him with the irregularities in Reyes-Romero's forms, asking whether it was "reading those forms correctly." App. 331. The Court then asked whether "that"—the antecedent of which was the content of "those forms"—"ma[de] any sense," and Darji admitted it did not. *Id.*

In context, Officer Darji's comment was a candid admission that he could not explain away the apparent problems with Reyes-Romero's removal proceeding. And, at least initially, the District Court agreed, summarizing that Officer Darji had admitted that "the process that was used here" did not "ma[ke] . . . sense." App. 476. The quite different notion that Darji

admitted that he had lied in his testimony, however, "is a kind of [factual] Lohengrin," in that we do not "know whence it came," *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). Because that notion finds no support in the record, we reject it.

As a result, nothing in Officer Darji's concession triggered *Napue* obligations on the part of AUSA Hallowell. Those obligations spring to life only when the prosecutor "knows that his witness is giving testimony that is substantially misleading" and where the misleading nature of the testimony is "obvious." *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974). A candid admission of the kind Officer Darji gave does not fit those criteria.

Nor do the remaining portions of the DHS officers' testimony. To be sure, both officers, testifying years later and with no specific memory of Reyes-Romero's removal proceeding, gave testimony that was at times equivocal, confusing, or inconsistent. Officer Darji, for instance, changed an answer he gave about whether a prior signature was required to authorize service of the I-851 on noncitizens. For his part, Officer Alicea gave difficult-to-reconcile answers in response to questions about when in the process the I-851's contents would be read to the noncitizen in Spanish. But to the extent the officers' testimony was somewhat "convoluted," App. 43 (citation omitted), it reflects at least in part the byzantine nature of the administrative removal system and in part the circumstances of their questioning. Given that the District Court assumed the questioning and raised a line of inquiry about the time stamps on the I-851 that Reyes-Romero had not flagged and for which the Government and its witnesses likely had not prepared,

it is unsurprising the officers were in some respects ill equipped to explain the contents of Reyes-Romero's A-file. In short, while we recognize certain weaknesses in the officers' testimony, we discern no basis in the record to conclude that the officers were deliberately perjuring themselves. At most, they exhibited the kind of inconsistency that is the normal stuff of cross-examination and that might lead a trier of fact to discount their testimony—but not to assume the sort of deliberate dishonesty that would require a prosecutor to correct the record. In our judgment, that distinction is critical here not only because of the effect on AUSA Hallowell's obligations but also because of the severe reputational, professional, and legal consequences that could flow from a finding that Officers Darji and Alicea deliberately lied under oath. That finding was unjustified here.

At bottom, the *Napue* argument comes to this: that because the District Court ultimately decided not to credit the officers' testimony, the Government must have been obligated to disclaim it mid-trial. That does not follow. In presenting the testimony of government witnesses, a prosecutor need not "play the role of defense counsel . . . and ferret out ambiguities in his witness' responses on cross-examination." *Harris*, 498 F.2d at 1169. He also cannot supplant the role of the finder of fact in assigning weight to testimony as he deems appropriate. We therefore discern no violation of AUSA Hallowell's *Napue* obligations and no basis here to infer bad faith.

iii. Litigating exhaustion and judicial review

We next confront the idea that the Government exhibited bad faith by continuing to litigate exhaustion and judicial review even after the extent of the irregularities in Reyes-Romero's A-file came to light. A review of the record reveals the opposite: that AUSA Hallowell promptly and appropriately abandoned all arguments on § 1326(d)(1) and (2).

The initial two-day hearing on Reyes-Romero's § 1326(d) motion took place in early January 2018. During the second day, the District Court informed the parties it was "highly likely" to rule in Reyes-Romero's favor on exhaustion and judicial review. App. 474–75. That left prejudice as "the only open issue," App. 543, on which the District Court requested additional briefing. The parties twice requested more time to submit a schedule for that briefing and did not settle on such a schedule until late January. A month later—and before its supplemental brief was due—the Government moved to dismiss under Rule 48. No doubt the Government expected its motion would be the end of the case. But after the District Court continued to press the Government on the merits of the § 1326(d) motion, it promptly filed a brief in mid-March making its position clear: It would "not rely on or adopt th[e officers'] testimony" and, if pushed to litigate the § 1326(d) motion, "w[ould] not present argument on any elements . . . other than the issue of prejudice." App. 755. And it reinforced that position at the next hearing.

AUSA Hallowell's response was prompt, unambiguous, and consistent with the best traditions and standards of his office. That it occurred "over two months" after the initial hearing, App. 32, was a product of the parties' agreed briefing schedule, the

Court's unexpected reservations about the Government's motion to dismiss, and its ongoing inquiry into the effect of a dismissal on future immigration proceedings. The Government was still "act[ing] promptly to correct [any] error," *United States v. Lain*, 640 F.3d 1134, 1139 (10th Cir. 2011), and its response is inconsistent with a finding of bad faith.

iv. Interactions between DOJ and DHS

We likewise see no signs of bad faith in AUSA Hallowell's inability to tell the District Court whether, if the prosecution were dismissed, DHS would detain Reyes-Romero or seek reinstatement of the 2011 removal order. In asserting that he could not "speak for DHS . . . or what [it] would do" in future immigration proceedings against Reyes-Romero, App. 617, AUSA Hallowell was faithfully representing our precedent to the District Court. *See United States v. Igbonwa*, 120 F.3d 437, 443–44 (3d Cir. 1997) (holding that an AUSA cannot bind DHS in future immigration proceedings absent DHS's consent). Had the Court granted the Government's motion to dismiss, any relevance of the 2011 order would have been left to DHS in the first instance (in deciding whether to pursue a new NTA or seek reinstatement) and, if necessary, to other administrative adjudicators and a different Article III court.

To be sure, it is possible for an AUSA, after having obtained "prior authorization from [DHS]," Justice Manual, *supra*, § 9-73.510, to come to a binding agreement with respect to future immigration proceedings against a noncitizen defendant. But an

AUSA lacks the power to do so on his own. More important, whether and under what circumstances he reaches out to DHS to explore such an arrangement is committed to his discretion—he is not bound to do so. And even if he *does* seek authorization from DHS, he cannot demand that the agency give it, and if the agency declines the AUSA cannot be held responsible. When viewed through an objective lens, therefore, the absence of such an arrangement between DOJ and DHS with respect to future proceedings against Reyes-Romero also does not support an inference of bad faith.

Two related issues must be addressed. First, we do not consider significant that DHS and DOJ were to some extent "intertwin[ed] . . . in this case," App. 37 (emphasis omitted), insofar as DOJ and DHS kept in contact about Reyes-Romero or a line-level DHS official was present at counsel table for all but one of the hearings before the District Court. Coordination between DOJ and other executive departments is by no means unusual, but it does not obviate the line between those departments or between a criminal prosecution and subsequent administrative proceedings. We therefore see no support for the notion that the Government here attempted to use its collaboration with DHS as both a sword and a shield against Reyes-Romero.

Second, we are equally unpersuaded that the AUSA exhibited bad faith by focusing on the criminal offense with which Reyes-Romero was charged, the evidence necessary to prove that offense, and the elements of Reyes-Romero's affirmative defense. Those were, after all, the only live issues over which the District Court had jurisdiction. Even so, AUSA Hallowell did his best to assist the Court in its consideration of

matters well beyond that jurisdiction, most notably the effect that various dispositions might have on future immigration proceedings against Reyes-Romero. The AUSA's responsiveness, candor, and professionalism in answering unanticipated questions bespeak good faith on his part and in the "position of the United States," 18 U.S.C. § 3006A app. And in general, the AUSA offered candid and accurate assistance to the tribunal; was forthright about the weaknesses in the case; and, once he had received additional evidence bolstering Reyes-Romero's arguments on prejudice and once the prosecution had exhausted more time and resources than was expected, sensibly reevaluated it and decided dismissal was in the best interests of justice. There is much to commend in the way the prosecution litigated this case, and certainly nothing of the "dishonest purpose or moral obliquity," *Manzo*, 712 F.3d at 811 (citation omitted), required to justify a Hyde Amendment award.

v. The Government's motion to dismiss

We now come to a central premise of the Hyde Amendment award: that the Government's motion to dismiss was motivated by, and evidence of, bad faith.

There is good reason for skepticism: It is ironic indeed that the government's decision to move to dismiss a criminal case with prejudice would be held up as proof of ill will toward the defendant. Normally, if circumstances arise making it clear that the Government's case is weaker than it once appeared and the "Government act[s] promptly to correct [that] error," a court will be hard pressed to find bad faith.

Lain, 640 F.3d at 1139. The District Court recognized this dynamic, correctly stating that if an AUSA "conclude[s] that a criminal prosecution should not proceed" and moves to dismiss, that is an appropriate exercise of prosecutorial discretion and precisely "how we want the system to work." App. 635. But it proceeded to find that motion was evidence of bad faith on two grounds.

The first was that the motion was designed "to shield the 2011 Removal Order from an adjudication of invalidity" and thereby interfere with future immigration proceedings against Reyes-Romero. App. 36. In other words, because the Government agreed the prosecution should be dismissed, it had no non-malicious reason for refusing "to not oppose the bare granting of Reyes-Romero's motion to dismiss." App. 4.

Implicit in that analysis is that there is no meaningful difference between (i) exercising discretion to dismiss the prosecution because of some "litigation risk" on the prejudice prong, App. 646, and (ii) conceding outright that Reyes-Romero has satisfied the prejudice prong. Not so. A prosecutor may have probable cause to believe an element of an affirmative defense is triable but still conclude that, because of the closeness of the question as well as other considerations such as expenses and the time a defendant has already been in custody, the interests of justice would not be well served by continuing to pursue the prosecution. That is, indeed, how the system should work. And, most critical, the Government must be free to do so without having to concede away the merits of the criminal charge or any

affirmative defenses, which would have been the effect of endorsing Reyes-Romero's § 1326(d) motion.

Nor can we agree that the Government was "[n]ever asked . . . to stipulate to 'prejudice'" and could have opted to "'not oppose' the granting of Reyes-Romero's motion." App. 15–16. Because dismissal under § 1326(d) requires prejudice, *see* 8 U.S.C. § 1326(d)(3); *Charleswell*, 456 F.3d at 358, the Government cannot agree to a § 1326(d) dismissal without acknowledging that the prejudice requirement has been met. And given the closeness of the prejudice question, *see supra* pp. 35–37 & n.13, it strikes us as objectively reasonable that the Government elected not to do so.

The second ground for the finding that the Government moved to dismiss in bad faith was that the reasons it offered in support of its motion were pretextual. After a review of the record, we conclude the Government's reasons were sensible and consistent. It explained, for instance, that its motion to dismiss was motivated in part by a desire to preserve litigation resources. That is no surprise given that the single-count prosecution had already lasted months and generated many hearings and briefs. True, the Government "then expended substantial resources on continuing to oppose Reyes-Romero's motion to dismiss" while its own motion remained pending. App. 39. But that was only because the Government's motion was held open, requiring that it continue to litigate the merits of Reyes-Romero's § 1326(d) defense. The Government's explanation can be viewed as contradictory only if we assume there was no difference between acceding to Reyes-Romero's motion and proceeding on the

Government's motion—an idea we have already rejected.

vi. Production of the color copies

Next, we see no evidence to support the idea that the late-in-the-game production of color copies from Reyes-Romero's A-file suggests bad faith on the Government's part. Under the line of cases springing from *Brady v. Maryland*, 373 U.S. 83 (1963), prosecutors have an affirmative duty to disclose material evidence favorable to the defendant. *Dennis v. Sec'y*, 834 F.3d 263, 284 (3d Cir. 2016) (en banc). But there is no question that AUSA Hallowell, after having received the color copies, promptly shared them with Reyes-Romero's counsel and with the District Court. That he did so was consistent with his *Brady* obligations as well as good faith in the management of the prosecution.

Nor is there anything to suggest the Government exhibited bad faith by producing the color copies months into the prosecution rather than at the outset. To begin, our precedent on the timing of *Brady* disclosures requires only that the government "make[] [the] evidence available during the course of a trial in such a way that a defendant is able effectively to use it." *United States v. Moreno*, 727 F.3d 255, 262 (3d Cir. 2013) (citation omitted). Reyes-Romero was certainly able to use the color copies of the forms to his benefit; those copies fed into the District Court's decision granting his § 1326(d) motion. More to the point, there was no reason why AUSA Hallowell—or, for that matter, Reyes-Romero's counsel, who was given an opportunity to access or request the original files—could have anticipated that the color copies would

contain meaningful, relevant evidence that the black-and-white reproductions did not. Under those circumstances, AUSA Hallowell lacked "actual or constructive possession" of the information contained in the color copies, *Hollman v. Wilson*, 158 F.3d 177, 180 (3d Cir. 1998), and accordingly that he did not request or produce them earlier in the litigation does not give rise to an inference of bad faith.

We end by addressing the assertion that the production of black-and-white copies was "a clear implication of conscious wrongdoing," App. 40, on the part of unnamed DHS officials. Because the Hyde Amendment is concerned only with prosecutorial misconduct, even such unscrupulous conduct by an independent executive department could not be laid at the prosecution's feet without a reasonable and logical basis for doing so. Moreover, a review of the record here reveals nothing apart from speculation suggesting that DHS's production of black-and-white copies was intended to shield Reyes-Romero's A-file from scrutiny—rather than, for instance, being the product of an outdated photocopier or cost-saving printing procedures. So thin a reed cannot justify a Hyde Amendment award.

vii. Litigation delay

Finally, we disagree that the criminal proceeding was "unnecessarily drawn out by the various litigation tactics taken by the Government." App. 43. The time between Reyes-Romero's motion to dismiss and the decision granting that motion was roughly seven and a half months. If that period is longer than in the typical § 1326 prosecution, the reasons are many, including the ongoing evolution of Reyes-Romero's

arguments on prejudice, mutual delays in the briefing schedule, complicated legal and factual questions and, above all, a willingness on the part of the District Court to hold outstanding motions open and solicit supplemental briefing. Those reasons for delay are unexceptional and understandable. But unwarranted delay on the part of the Government was not one of them.

* * *

Ultimately, with great respect for the District Court and its careful administration of this prosecution, we nonetheless conclude based on our review of the record that "a mistake has been made." *Heavrin*, 330 F.3d at 727 (citation omitted). There is no viable evidence that the "position of the United States," as that term is properly understood in the Hyde Amendment, was frivolous or in bad faith.

We share the District Court's view that Reyes-Romero's 2011 expedited removal proceeding deviated from the ordered, sensible process we demand of those who enforce the nation's immigration laws. Indeed, that is the Government's view as well. And reasonable minds may differ about precisely how the prosecution should have reacted once those issues became apparent. But where reasonable minds may differ, and where the Government made objectively reasonable and defensible choices throughout the prosecution, there can be no Hyde Amendment liability.

IV. CONCLUSION

For these reasons, we will reverse the District Court's orders awarding Reyes-Romero attorney's fees and costs under the Hyde Amendment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
	)	
	)	2:17-cr-292
v.	)	
	)	
MARIO NELSON REYES-ROMERO,	)	
	)	
Defendant.	)	

OPINION

Mark R. Hornak, Chief United States District Judge.

From time to time, a court is compelled to render a decision that was completely avoidable by at least one party and, in doing so, must place on the public record conclusions as to the actions of that party that are both disturbing and uncharacteristic of that party's course of conduct in other settings. This is just such a decision, involving the exercise of the federal government's power to investigate, bring, and pursue criminal prosecutions.

The Government, in its capacity as prosecutor, "may prosecute with earnestness and vigor—indeed, [it] should do so. But, while [it] may strike hard blows, [it] is not at liberty to strike foul ones." *Berger v. United*

States, 295 U.S. 78, 88 (1935).[1] This Opinion addresses an award of attorney's fees under the Hyde Amendment, which is one avenue of relief available to individuals after just such a prejudicial detour from the fair administration of justice by the two Executive Departments of the federal government involved here.

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Mr. Mario Nelson Reyes-Romero ("Reyes-Romero") seeks an award of attorney's fees and expenses pursuant to the Hyde Amendment, 18 U.S.C. § 3006A (statutory note), Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997), claiming that the Government's[2] criminal prosecution against him was vexatious, frivolous, and/or in bad faith. Reyes-Romero filed the pending Application for Award of Attorney's Fees and Litigation Costs ("Fee Application") on August 7, 2018. (Fee Application, ECF No. 94.) Both parties submitted briefs (ECF Nos. 95, 105, 106), and the Court held an Oral Argument.[3] (ECF No. 111.) Reyes-Romero's Fee Application is granted to the extent that the Court will

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[1] "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . . This authority has been granted by people who really wanted the right thing done—wanted crime eliminated—but also wanted the best in our American traditions preserved." Robert H. Jackson, Attorney General, Address to the Second Annual Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940).

[2] Unless otherwise referenced with particularity, the term "Government" and "DOJ" are used interchangeably to refer to the United States Department of Justice.

[3] The Government advised the Court at the Oral Argument on the Fee Application that the Department of Homeland Security (DHS) was given notice of Reyes-Romero's Fee Application.

award attorney's fees and litigation costs to Reyes-Romero, the final amount of which will be determined in further proceedings.

I. Factual Background

On October 24, 2017, Reyes-Romero was indicted in this District on one (1) count of Reentry of Removed Alien, 8 U.S.C. § 1326. (Indictment, ECF No. 1.) The Indictment stated that Reyes-Romero had been previously removed from the United States in 2011[4] pursuant to law ("2011 Removal") and later knowingly and unlawfully reentered the United States. (*Id.*)

On November 17, 2017, Reyes-Romero filed a motion to dismiss the Indictment and asserted the affirmative defense set out in § 1326(d),[5] which allows for a collateral attack on the validity of the underlying removal order (in this case, the Removal Order resulting from the 2011 Removal Proceedings). (Reyes-Romero's Mot. to Dismiss, ECF No. 14.) The

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[4] In 2011, DHS commenced an administrative removal proceeding against Reyes-Romero pursuant to 8 U.S.C. § 1228, which authorizes the expedited removal of aliens convicted of "aggravated felonies" as that term is defined under federal law. (Op., ECF No. 92, at 2.)

[5] A defendant charged with reentry of removed alien under § 1326 may collaterally attack the underlying removal order if the defendant establishes that:

> (1) the defendant exhausted any administrative remedies that may have been available;
> (2) the deportation proceedings from which the underlying removal order was issued improperly deprived the alien of the opportunity to obtain judicial review; and
> (3) the entry of the removal order was "fundamentally unfair."

8 U.S.C. § 1326(d); *United States v. Charleswell*, 456 F.3d 347, 351 (3d Cir. 2006).

parties briefed the issues in Reyes-Romero's motion to dismiss extensively, and the Court conducted a two-day hearing and oral argument.[6] The parties were also permitted to file post-hearing briefs. (Order, ECF No. 27.)

Then, on February 27, 2018, the Government filed its own motion to dismiss the Indictment with prejudice (Gov't's Mot. to Dismiss, ECF No. 46), but also refused to consent to or to not oppose the bare granting of Reyes-Romero's motion to dismiss. Ultimately, the Court issued an Opinion and accompanying Order, dated July 2, 2018, granting Reyes-Romero's motion to dismiss, holding that the underlying 2011 Removal Order was wholly contrary to law, and ordering the dismissal of the Indictment with prejudice. (Op., ECF No. 92, available at 327 F. Supp. 3d 855 (W.D. Pa. 2018); Order, ECF No. 93.) In the same Opinion, the Court denied the Government's motion to dismiss, concluding that the Government's motion to dismiss was "principally motivated" by a desire to avoid an adjudication on the validity of Reyes-Romero's 2011 Removal so as to expedite further proceedings against him, and that it was in the interests of justice for the Court to adjudicate and grant Reyes-Romero's motion to dismiss to avoid prosecutorial harassment of Reyes-Romero. (Op. at 51–62.) The Government did not appeal that July 2, 2018, Order, rendering the Court's findings and conclusions in that July 2, 2018, Opinion and Order final.

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[6] The parties pre-hearing briefs are on the docket at ECF Nos. 14, 15, 16, 17, 19. The Court held the two-day proceeding on January 3 and 4, 2018. (ECF Nos. 23, 26.)

Reyes-Romero now seeks an award of attorney's fees and litigation costs, arguing that the position of the United States in this criminal case was vexatious, frivolous and/or in bad faith. Given the "scienter" requirements squarely at issue here, the Court must, regrettably, begin by again summarizing the record as it relates to the evidence advanced and positions taken by the United States in this criminal proceeding, largely repeating its now-final findings and conclusions from the July 2, 2018, Opinion, as to the conduct of the Government in this case.[7]

A. The Indictment is Filed and Reyes-Romero Files His Motion to Dismiss

A month after the Government filed its Indictment charging Reyes-Romero with Reentry of Removed Alien, Reyes-Romero filed his motion to dismiss pursuant to § 1326(d). (ECF No. 14.) Reyes-Romero's motion to dismiss attacked the validity of the 2011 Removal Order on the basis that it was premised on unintelligent waivers of his rights that he executed during his 2011 Removal proceedings.[8] To support this argument that his alleged "waivers" were invalid, Reyes- Romero attached two black-and-white copies of the DHS forms that were completed during his 2011

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[7] Unlike the background section in this Court's July 2, 2018, Opinion, the background section here lays out the series of events in this case in the order in which they unfolded before the Court, so the reader can better appreciate what happened.

[8] Where the underlying removal proceeding "is so procedurally flawed that it 'effectively eliminated the right of the alien to obtain judicial review,' we may invalidate the criminal charges stemming therefrom." *Charleswell*, 456 F.3d at 352 (quoting *United States v. Mendoza-Lopez*, 481 U.S. 828, 839 (1987)). Congress codified this affirmative defense in § 1326(d).

Removal Proceeding—DHS Form I-826 and DHS Form I-851 (the "Forms") as part of the appendix to his brief in support of his motion to dismiss the Indictment ("Appendix"). (Op., at 2; *see also* App. 22–23, 106, ECF No. 16.)[9]

The first Form at issue, the I-826, is titled, "Notice of Rights and Request for Disposition." (Ex. A.) The I-826 informed Reyes-Romero that he had a right to a hearing before an Immigration Judge to determine whether he may remain in the United States, and provided three options: request a hearing, declare fear of returning to the home country, or admit illegal status and surrender rights to a hearing. (*Id.*) The black-and-white copy of Reyes-Romero's completed I-826 shows that Reyes-Romero supposedly selected two wholly irreconcilable options: he both requested a hearing and surrendered his rights to a hearing. (*Id.*) The I-826 indicates a date and time of service of June 23, 2011, 9:00. (*Id.*)

The second Form at issue, the I-851, is a two-page document titled, "Notice of Intent to Issue a Final Administrative Removal Order." (Ex. B.) The first

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[9] A black-and-white copy of the completed I-826 is attached to this Opinion as Exhibit A. A black- and-white copy of the completed I-851 is attached to this Opinion as Exhibit B. A color copy of the completed I-826 is attached to this Opinion as Exhibit C. A color copy of the completed I-851 is attached to this Opinion as Exhibit D. As the Court did in its July 2, 2018, Opinion, the Court has partially redacted the DHS Officers' signatures from the copies of the Forms attached to this Opinion because the publication of complete signatures could pose an identity theft issue to those involved. The appearance of those signatures is not germane to the issues here. The Court has also redacted other non-germane identifying information on the copies of the Forms, including addresses and DHS internal identification numbers.

page contains information about Reyes-Romero with a charge indicating that Reyes-Romero is deportable based on his conviction of an aggravated felony and stating that DHS was serving such notice "without a hearing before an Immigration Judge" but stating that Reyes-Romero could rebut the charges stated on the Form. At the bottom of the first page of the I-851, there is a signature line for "Signature and Title of Issuing Officer." (*Id.*) That line contains a signature by the "Issuing Officer" and bears a date and time notation of June 23, 2011, at 10:00. (*Id.*)

The first section at the top of the second page of the I-851 is the "Certificate of Service," which displays Reyes-Romero's signature and a date and time notation of June 23, 2011, 9:20. (Ex. B.) Thus, the Form was signed by the Issuing Officer and "issued" forty (40) minutes *after* receipt was purportedly acknowledged by Reyes-Romero at 9:20 AM that day. (Op. at 9.) The middle section of the second page, where Reyes-Romero would have contested removal or sought withholding of removal, is blank. (Ex. B.) The final section has three boxes checked, corresponding with the following selections: (1) expressing no desire to contest and/or to request withholding of removal, (2) admitting the allegations and charges contained in the Form and acknowledging ineligibility for any form of relief from removal, and (3) waiving the right to apply for judicial review. (*Id.*) Below these three selections is Reyes-Romero's signature, with a date and time of June 23, 2011, 9:00 written in that section, twenty (20) minutes before the time noted next to Reyes-Romero's signature in the "Certificate of Service" section. (*Id.*) It is "witnessed" by the interpreter and DHS "serving"

Officer, Jose Alicea, with the very same date and time notation. (*Id.*)

At the time that Reyes-Romero had filed his motion to dismiss and attached the Forms, it was crystal clear to anyone who looked at the black-and-white copies of the I-826 and I-851 that the following events were recorded as transpiring in the 2011 Removal proceeding: Reyes-Romero supposedly waived his rights to contest removal or apply for judicial review on the I-851 twenty (20) minutes *before* he acknowledged receipt of the I-851 and an hour before it was ever "issued." (Op. at 10–11.) He supposedly waived those hearing rights (using check marks on the I-851) at the exact moment that he was served with the I-826, where he had also affirmatively indicated his request for a hearing (using X marks). (*Id*.) With respect to the different markings attributable to Reyes-Romero, the markings switched from Form to Form yet key ones (check marks) matched other markings attributed to the Officers on each such Form. (*Id.*; Exs. A, B.)

Despite the inherent inconsistency as to Reyes-Romero's desire for a hearing that was plain from the face of the Forms, the Government responded to Reyes-Romero's motion to dismiss by arguing that he "knowingly and intelligently waived his right to contest the 2011 Immigration proceedings in the Form I-851 waiver." (ECF No. 17, at 7.) The Government argued that the I-851 represented a valid and completed waiver and that Reyes-Romero's dual-selection on the I-826 made the I-826 "internally inconsistent at best" but still insufficient to show that his waivers were not knowing and voluntary. (*Id.* at

8.) As later events would demonstrate, that position of the DOJ was unsupportable.

The Court scheduled a hearing and oral argument on Reyes-Romero's motion to dismiss. The first day of that hearing, January 3, 2018, dealt exclusively with the issue of whether Reyes-Romero had knowingly and intelligently waived his rights to challenge his removal when he signed the Forms. (*See* Tr. of Proceedings on Jan. 3, 2018, ECF No. 30.) The Government began its presentation by calling two witnesses, the DHS Officers whose names and signatures appear on the Forms, Officers Trushant Darji and Jose Alicea. (*Id.*)

Both DHS Officers presented testimony that "was, at key points, internally inconsistent, contradictory in comparison with the content of the Forms, and simply nonsensical." (Op. at 11.) For example, Officer Trushant Darji testified that if a detainee selects multiple options as to requesting a hearing and declining a hearing, a DHS Officer would "absolutely" attempt to clarify the alien's desires before other forms were filled out, including by having the detainee initial his "real" choice, even though he clearly did not do so as to Reyes-Romero's I-826. (*Id.* at 12.) Officer Darji initially testified that he served all forms together at the same time upon a detainee, only to then change his testimony moments later claiming he normally serves the "rights form" (the I-826) first, even though the time stamps on Reyes-Romero's Forms indicate he supposedly was presented with them (and signed them) at the exact same time. (*Id.*) Officer Darji also flip-flopped his testimony with respect to when his supervisor would sign off on the issuance of the I-851, i.e. whether that was before the documents were to be

served on a detainee or after they were served upon and completed by the detainee, despite his explaining that the I-851 states that the issuing signature "authorize[s] you to approach the alien with this document." (*Id.* at 12–13.) After a recess, Officer Darji reversed course on the purpose of the "issuing signature" as well, in order to make it align with his testimony that the issuing signature was to be completed *after* the document was served. (*Id.* at 13.) When the Court asked Officer Darji why he gave opposite answers, Officer Darji responded that "[t]hinking about it after I answered the first time, the second answer was more appropriate." (*Id.*) This response required the Court to follow-up with, "[w]hich answer was true?" (*Id.*)

Similar inconsistencies arose when Officer Darji was asked to explain why the I-851's certificate of service would be completed only after a detainee waived his rights, in which Officer Darji testified that waivers were signed before there was a required explanation and confirmation of understanding. (*Id.* at 14.) At the end of both the Government's and Reyes-Romero's examination of Officer Darji, the Court asked the witness the following question:

> **THE COURT:** Okay. But in the circumstance where it is a form 851 that is going to be used, in this specific circumstance, am I reading these forms inaccurately — or actually am I reading them accurately that within moments of 9 o'clock in the morning on June 23rd, 2011, several things had occurred pretty much all at once. This defendant was told he had a right to request a hearing. He requested a hearing. He said he didn't want a hearing. And he was told

> he couldn't have a hearing. Am I reading those forms correctly, sir?
>
> **THE WITNESS:** Yes.
>
> **THE COURT:** Does that make any sense at all to you, sir?
>
> **THE WITNESS:** No, Your Honor.

(Op. at 22; *see also* ECF No. 30, at 61:21–62:14.) At this point in the hearing, the Court recessed to allow everyone to "reflect on what we have heard so far." (ECF No. 30, at 63:13–16.)

Following the recess, the Government pressed on, calling its next witness. Officer Alicea's testimony was no better in terms of coherency or credibility. (*See* Op. at 14–19.) He testified that he was commonly involved in these types of removal proceedings, so he did not have a specific recollection of Reyes-Romero's removal proceeding. (*Id.* at 15.) In the same direct examination, he testified these proceedings were actually rare and he could not recall any other administrative proceeding similar to Reyes-Romero's. (*Id.*) He testified that Officers are to serve one Form at a time and then go on to the next, which, based on identical time stamps on both Forms, did not happen in Reyes-Romero's case. (*Id.*; ECF No. 30, at 89:2–17.) Officer Alicea testified that Reyes-Romero was read his rights in Spanish (he does not speak English and the Forms were printed in English only) only *after* he purportedly waived his rights.[10] (Op. at 15.)

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[10] Specifically, Officer Alicea was asked why the time stamp associated with the waiver selection on the I-851 shows 9:00 AM yet the "Certificate of Service" section on the very same I-851 page bears a time stamp of 9:20 AM. (ECF No. 30, at 90:21–91:6.)

At the continuation of the hearing the following day, Reyes-Romero asked the Court to make findings that the waivers were invalid in order to narrow the issues in dispute to solely the last prong of the § 1326(d) test, prejudice. (Tr. of Proceedings on January 4, 2018, ECF No. 31, at 20:21–21:14.) The Government continued to advocate for a finding of a valid waiver. It argued that the waiver inquiry should focus only on the I-851 and the Court should simply ignore the I-826 even though that would make it a "legally pointless document." (*Id.* at 24:17–25.)

> **[Prosecutor]**: Mr. Alicea testified and I believe Officer Darji testified as well that the 851 form is the form that matters for the administrative removal —
>
> **THE COURT**: You are saying the agents of the United States Department of Homeland Security required this defendant and everyone

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Officer Alicea testified that the twenty minutes *after* Reyes-Romero waived his right "to contest and/or request withholding of removal" (Ex. B, at 2), "would have been about the time my explanation was completed." (ECF No. 30, at 91:7–8.) The Government then confirmed that "during those twenty minutes [after Reyes-Romero waived away his rights at the bottom of I-851], according to your practice, you would have been reading the document in Spanish to the alien?" (*Id.* at 91:9–11.) Officer Alicea responded, "Yes, sir." (*Id.* at 91:12.) Officer Alicea immediately switched gears and stated that he read the document in Spanish *before* a detainee made any selections (*Id.* at 91:13–19), which, of course, then leaves the question of what happened in the twenty minutes between Reyes-Romero waiving his rights on the I-851 and later acknowledging service of the I-851 unanswered.

This is but one of the inconsistencies, implausibilities, and falsehoods in both Officers' testimonies. For a more detailed description, see the July 2, 2018, Opinion, at 11–15.

> else to go over and to sign a legally pointless document, the 826?
>
> **[Prosecutor]**: That's my understanding of their testimony, Your Honor. My understanding is —
>
> **THE COURT**: Do you think I should believe that?
>
> **[Prosecutor]**: That's what the agents have testified to, Your Honor.
>
> **THE COURT**: I understand. I heard the words. Do you think I should believe their testimony under oath in that regard?
>
> **[Prosecutor]**: I think you should, Your Honor.

(ECF No. 31, at 24:14–25:4.)

Next, in an effort to explain the testimony of the Officers, the Government argued to the Court that its own understanding of the Officers' testimony was actually that Reyes-Romero placed his signature on a *blank* waiver section before selecting any waiver option, seemingly akin to signing a blank check, but that that did not invalidate the waiver. (*Id.* at 30:6–25.) At this point, the Court asked the first of several questions about the Government's legal positions taken with respect to the affirmative defense asserted by Reyes-Romero:

> **[PROSECUTOR]**: Your Honor, my understanding of that testimony was that the bottom signature may have happened at 9 a.m., but that the checkmarks placed on the box by Mr. Reyes-Romero would not have happened until after the —

THE COURT: Oh, oh, you are kidding. You are absolutely kidding, [Prosecutor], if the United States is arguing that a waiver is valid as to boxes that are checked after it is signed by the person making the waiver.

[PROSECUTOR]: Your Honor, there is a second signature on the form toward the top for Mr. Reyes, and that's —

THE COURT: The signature at the bottom is the waiver. You are telling me that before the boxes are checked indicating the waiver, the waiver section is signed? Is that what the United States is arguing?

[PROSECUTOR]: That is my understanding of the testimony of the officers, Your Honor.

THE COURT: Well, that wasn't my understanding of the testimony because I might have stopped the hearing right in its tracks if they testified to that yesterday. I have got to tell you, [Prosecutor], I find the position of the United States of America and the Department of Homeland Security at least intriguing, if not stunning. We've had two agents of the United States Department of Homeland Security come in and say that they have this defendant waive his rights before they were read to him. Waived his rights as to a charging document before the charging document was issued. And the United States is now taking the position that it's a valid waiver when somebody signs the waiver before the indicia of the waiver are marked, that is the checkmarks, it's like signing a blank check. Are you sure that's the argument of the United

> States Department of Justice? Justice. Are you sure that's the argument. . . ?
>
> **[PROSECUTOR]**: Well, Your Honor, if that's — if your finding is that —
>
> **THE COURT**: I am making no finding. I want to know what the position of the Attorney General of the United States represented by you is. That it is a valid waiver of rights when someone signs the form in blank before the waiver checkmarks are placed on it; is that the position of the Attorney General of the United States?
>
> **[PROSECUTOR]**: I would say in this case because there is a second signature toward the top that is dated after the checkmarks are placed, that makes the form valid. That is the position, Your Honor.

(ECF No. 31, at 29:6–30:25.)

The Court then, on January 4, 2018, made tentative findings that there was no voluntary and intelligent waiver by Reyes-Romero in the 2011 Removal Proceeding and that Reyes-Romero would likely prevail on the first two elements and the first prong of the third element of the § 1326(d) affirmative defense, which would leave only the second prong of the third element[11] at issue. (*Id.* at 51:9–52:10.)The remainder

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[11] The third element of § 1326(d) asks whether the entry of the removal order was "fundamentally unfair." *Charleswell*, 456 F.3d at 359. In order to meet this element, the defendant must establish both (a) that some fundamental error occurred and (b) that as a result of that fundamental error, the defendant suffered prejudice. *Id.* For the second prong, resulting prejudice, defendant must establish (by a preponderance of the evidence) a

of the January 4, 2018, hearing involved Reyes-Romero's witnesses, all family members, testifying about their family's fear of persecution and asylum eligibility.

After this two-day hearing, the Court set an optional post-hearing briefing schedule, that was later extended through March 2018. (Order, ECF No. 27.) However, before that expanded deadline arrived, on February 27, 2018, the Government filed its own motion to dismiss the Indictment (ECF No. 46).

B. The Government Files Its Own Motion to Dismiss the Indictment

The Government filed its motion to dismiss pursuant to Federal Rule of Criminal Procedure 48(a). This Rule provides that "[t]he government may, *with leave of court*, dismiss an indictment, information, or complaint." Fed. R. Crim. P. 48(a) (emphasis added).[12]

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reasonable likelihood that the result would have been different if the fundamental error in the removal proceeding had not occurred. *Id*. at 361. As noted below, in an egregious case, such prejudice may be presumed. *Id*. at 362 n.17. This Court applied that presumption, in addition to concluding that the Defendant satisfied both prongs of the traditional test, in issuing its now-final Order. (Op. at 51.) The litigation of the third element is referred to throughout the case by the Court and the parties as the "prejudice issue."

[12] A court is to grant a Rule 48(a) motion to dismiss unless such dismissal is "clearly contrary to manifest public interest." *In re Richards*, 213 F.3d 773, 787 (3d Cir. 2000). "[R]efusal to dismiss is appropriate only in the rarest of cases," *id*. at 786, but a district judge "has independent responsibilities" to protect certain rights, interests, and duties. *Id*. at 788. The district court's exercise of its judgment in considering a Rule 48(a) motion, as set out in *In re Richards*, takes two forms. First, it protects a defendant from harassment such as repeated prosecution and also protects

In its motion to dismiss, the Government articulated that "based on evidence [introduced at the prior hearings] and on additional factual information that has come to the attention of the Government since the hearing[s], the United States has determined that dismissal of the indictment in the above-captioned criminal case is in the interests of justice." (Gov't's Mot. to Dismiss, ECF No. 46, at 1.) Reyes-Romero filed objections to the Government's motion to dismiss, articulating that a simple dismissal of this case, even with prejudice, without a formal adjudication on the merits of his affirmative defense would leave him exposed to possible reinstatement of his 2011 Removal Order in future immigration proceedings. (ECF No. 48.)

Given Reyes-Romero's objections, the Court then held a hearing and oral argument on the Government's motion to dismiss on March 1 and 2, 2018. (ECF Nos. 53, 54.) The Government argued that a trial judge must grant a Government's motion to dismiss absent the existence of improper motives of the prosecutor's office. Given what had transpired at the hearing on Reyes-Romero's motion to dismiss, the Court, once again, reiterated the egregious nature of the conduct by the DHS Officers—both their conduct in 2011 and their testimony during proceedings in this criminal case—and referenced the relationship

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judicial processes from abuse. *Id.*; *see Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977) (per curiam). Second, "the public has a generalized interest in the processes through which prosecutors make decisions about whom to prosecute that a court can serve by inquiring into the reasons for a requested dismissal." *In re Richards*, 213 F.3d at 789.

between the U.S. Attorney's Office and DHS in the case:

> I think what the testimony of those agents, the portions of it that were true — because I have concluded that parts of it were not true, they were lies. But what was true demonstrated a level of law enforcement outrageousness I have not seen in any other case since I have been a federal judge. . . . the choice your office has to make is when you are going to decide that you can't continue to rely on that testimony, because under *Napue* and a series of other US Supreme Court cases, your office is not permitted to rely on testimony that's not true. . . . . Because I re-read the testimony last night. It was the single mo[]st troubling thing I have read not only in the time I have been a district judge, but in the time I have been a lawyer. . . . Your colleagues weren't there. But there does come a point where the United States Department of Justice is adopting it.

(ECF No. 58, at 14:20–16:24.) The Government acknowledged the Court's observation but did not disavow the DHS Officers' testimony. (*Id.* at 17:2–6.)

After identifying that there was a plausible risk of harassment to Reyes-Romero in future immigration proceedings and that there was a legitimate public interest in getting to the bottom of what happened in the 2011 Removal Proceeding and then in this proceeding (as articulated by our Court of Appeals in *In re Richards*), the Court pressed the Government as to its reasons for seeking dismissal in the manner in which it had. Here is what the Court learned.

First, under either the Government's or Reyes-Romero's motion to dismiss, the end result for this criminal prosecution would be exactly the same—a dismissal of the Indictment with prejudice. Second, despite the fact that the granting of either motion to dismiss would have an identical impact on the DOJ's ability to criminally prosecute Reyes-Romero for this offense in the future (e.g., end it), the prosecutor would not consent to or agree to not oppose Reyes-Romero's motion to dismiss because it was "not prepared to stipulate to the prejudice prong" of the § 1326(d) test. (Tr. of Proceedings on March 1, 2018, ECF No. 57, at 30:5–10.) Importantly, neither the Defendant nor the Court ever asked the Government to stipulate to "prejudice," but asked only whether it would "not oppose" the granting of Reyes-Romero's motion to dismiss. (*Id.* at 30:5–18.) Third, despite the Government's refusal to so stipulate, the Government's stated reason for seeking dismissal of the Indictment was to preserve litigation resources in light of the Government's recent "assessment of its likelihood of success on that [§ 1326(d)] defense." (*Id.* at 36:13–21.) The Government indicated that its "assessment" incorporated certain information discovered in immigration files of Reyes-Romero's family members, which had yet to be turned over to Reyes-Romero. (*Id.* at 32:6–37:14.)

At this juncture in the proceedings, the Government's desire to avoid an adjudication on the merits but to also request a dismissal with prejudice was peculiar, to say the least. Even more peculiarly, despite citing a desire to preserve litigation resources, the Government did not ask that the Court stay the briefing of Reyes-Romero's motion to dismiss

(including briefing by the Government) while the Court considered its motion to dismiss. Instead, putting aside its admission that its "likelihood of success" (based on its own assessment) on a § 1326(d) disposition did not justify the further expense of its litigation resources, if Reyes-Romero was to file supplemental briefing on the prejudice issue with respect to his motion to dismiss, the Government wanted to plow ahead and submit its own supplemental briefing. (*Id.* at 30:20–31:1.)

These irreconcilable positions advanced by the Government led the Court to further inquire about what became clear was the real difference between an adjudication on the § 1326(d) affirmative defense and a simple dismissal of the Indictment with prejudice on the Government's motion to dismiss: the effect of the 2011 Removal Order on Reyes-Romero's future immigration proceedings. What was obvious was that a simple dismissal of the Indictment on the Government's motion to dismiss would leave the 2011 Removal Order intact,[14] but if the Court concluded that the 2011 Removal was contrary to law, DHS likely could not rely upon in it in later proceedings.[15]

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[14] "That is important here because prior to the Defendant's Indictment in this case, on October 3, 2017, DHS issued a 'Notice of Intent/Decision to Reinstate Prior Order,' which provided notice of the Secretary of Homeland Security's intent to reinstate the 2011 Removal Order." (Op. at 55.) "Pursuant to 8 U.S.C. § 1231(a)(5), when a prior order of removal is reinstated, the prior order of removal is not 'subject to being reopened or reviewed' at the administrative immigration level." (*Id.* at 55 n.57.)

[15] "While[§ 1231(a)(5)] prohibits relitigation of the merits of the original order of removal, it does not prohibit an examination of whether the original order was invalidated. . . ." (Op. at 55

As this Court recognized, "[t]he long and the short of it is that a determination as to the validity of the 2011 Removal may be a matter of substantial consequence in regard to future proceedings involving the Defendant." (Op. at 55 n.57.)

Despite the constant and obvious collaboration between DHS and DOJ observed by the Court up to and including the current juncture in the case, at the March 1, 2018, hearing, the Government was unable to provide the Court with information about how DHS would choose to proceed in this particular case in light of the dichotomy noted above, ECF No. 57, 7:20–23, 8:10–16, notwithstanding that an ICE Officer was in Court and seated at counsel table. (ECF No. 57, 2:6–8.) Given the lack of answers to the Court's questions and the rarity of an opposed Rule 48(a) motion to dismiss, the Court took the Government's motion to dismiss under advisement. Both parties continued to brief the "cross" motions to dismiss, and the Government finally turned over its immigration files to Reyes-Romero on or about March 12, 2018.[16] (ECF Nos. 59–62.)

C. The Parties Receive the Color Copies of the DHS Forms

(quoting *Ponta-Garcia v. Attorney Gen. of US.*, 557 F.3d 158, 163 (3d Cir. 2009).)

[16] After asking the Court for four (4) extensions in order to allow DHS to produce the relevant documents and conduct necessary redactions, the Government actually instructed DHS to cease document production and redaction once it filed its own motion to dismiss, despite its production obligation remaining in effect. (Op. at 61.)

On March 14, 2018, Reyes-Romero filed color copies of the 2011 DHS Removal Forms, that were turned over to his counsel by the Government, as attachments to his brief opposing the Government's motion to dismiss. The color copies are attached to this Opinion at Exhibits C and D. (ECF No. 63-1 to -6.)

At that point, the cat was conclusively out of the bag. The color copy of I-826, which showed that Reyes-Romero had selected two contradictory options with respect to seeking a hearing, also showed that the selection marks indicating a desire to *waive* the right to a hearing was made partially in light blue ink, the same light blue ink that marks Officer Darji's signature.[17] The selection next to the option *requesting* a hearing is entirely in black, the same black that marks Reyes-Romero's signature. The Court noted in its prior Opinion that it "harbors substantial doubt that Reyes-Romero personally made the critical [waiver] notations." (Op. 11 n.6.)

According to the Government, the color copies were not a factor in its decision to move for dismissal of the Indictment because the Government had reached that decision prior to its review of the color copies. (ECF No. 66, at 7.) It also asserts, without opposition, that it had requested the color copies from ICE in early March 2018, and prior to that time, both parties in this case were operating with solely the black-and-white versions. (ECF No. 105, at 18.) But that would not get the United States off the hook, since the DHS Officers

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[17] The Court can best describe the "waiver" selection as a small thin black X as well as a light blue slash (or what may better be described as half of an X). On the other hand, the "hearing" selection is best described as a boldened X, as if it was reinforced.

knew full well what they did in 2011 and what the color copies of the Forms would show. *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 278 (3d Cir. 2016) ("[F]avorable evidence in the police's possession is imputed to the prosecution.").

About a week after the color copies of the Forms were filed with the Court—eleven (11) weeks after the DHS Officers testified and three (3) weeks after the Court warned the Government that it must take a position with respect to the veracity of its own witnesses' testimony—the Government, for the first time, informed the Court that it "does not rely on or adopt" the Officers' testimony. (ECF No. 66, at 7.) It also asserted that it would not "present argument" on any § 1326(d) issue other than the prejudice issue. (*Id.*) The Court then prodded the Government on its position with respect to its own witnesses' testimony. At the March 22, 2018, hearing, the Court and the Government had the following exchange:

> **[Prosecutor]**: Your Honor, we are saying that we will not rely on that testimony moving forward in this case.
>
> **THE COURT**: Why? Why won't you rely on it?
>
> **[Prosecutor]**: Your Honor, we don't feel that that testimony can support a verdict for the Government on the first two prongs of the *Charleswell* case.
>
> **THE COURT**: If believed, it's legally insufficient? Or I shouldn't believe it?
>
> **[Prosecutor]**: We understand that Your Honor will make the final decision as to whether that testimony could be believed or not. We recognize that, Your Honor.

> **THE COURT**: Well, I understand that. I'm asking the lawyer for the United States of America, should I believe that testimony?
>
> **[Prosecutor]**: Your Honor, you should give it as much weight as you see fit.

(ECF No. 77, 27:7–22.)

In the Court's estimation, this is a remarkable position to be taken by the United States Department of Justice—the agency entrusted by law and constitutional custom with speaking in federal Court, this federal Court, on behalf of the people of the United States. To this day, DOJ tells the Court that it should treat the only testimonial evidence the DOJ offered to the Court—testimonial evidence from the federal officers who were in "the room where it happened"[18] — as some type of evidentiary jump ball.

The United States did not then, and does not now, have the luxury of punting on the credibility of its own (and its only) witnesses in such a case as this, and this indifferent approach to its central obligations to the truth-seeking process in federal court adds substantial support to the Fee Application here, as will be further explained below.

For the remainder of the case, the Government maintained a non-committal position with respect to the Officers' testimony. While it stopped affirmatively relying on the testimony and did not present further arguments on the first two elements of § 1326(d), the Government never addressed whether the testimony was credible or was reliable. The Government never

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[18] Leslie Odom, Jr., *The Room Where It Happened, on* Hamilton: Original Broadway Cast Recording (Atl. Recording Corp. 2015).

acknowledged that the purported waivers on the Forms were what they facially demonstrated—invalid—or that the DHS's reliance on them in 2011 was contrary to law and due process. Instead, the parties proceeded to battle over the second prong of the last element of the § 1326(d) test—the prejudice issue.[19]

D. The Government's Position with Respect to Its Authority to Speak for DUS

As the litigation of this criminal case continued, two issues that were largely intertwined surfaced. First, given Reyes-Romero's request for release on bond, the Court needed to sort through the interplay between an Article III court potentially granting bond and conditions of release and an ICE detainer. Second, in order to appreciate the difference between the Government's motion to dismiss and Reyes-Romero's motion to dismiss, the Court needed to sort through the impact of an adjudication of the § 1326(d) affirmative defense and an outright dismissal of the Indictment with no adjudication. For both issues, the question returned to "what will DHS do next?"—be that a reinstatement of the prior 2011 Removal Order or initiation of new removal proceedings without any reliance on the 2011 Removal and the involved Forms. The Government, as at the prior hearing, was simply unwilling to provide any insight into DHS's position, or apparently to lift a finger to figure it out.

At the March 22 hearing, which was scheduled as a "bond hearing," when asked whether ICE would detain Reyes-Romero should the Court release him on

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[19] *See* note 11 *supra.*

bond pending the resolution of this criminal matter, the Government responded that it simply could not "speak to what ICE would do," even though the interplay between detainers was *the* issue placed on the table prior to the March 22 hearing. (ECF No. 77, at 19:3–4.) Again, an ICE Officer was seated at the Government's counsel table. (*Id.* at 3:18–20.) The Court asked why the prosecutor could not simply ask the ICE Officer there and then. (*Id.* at 19:5–14.) The prosecutor did not do so, articulating that the ICE Officer present was simply a "line Officer," and as an Assistant United States Attorney, he himself had limited delegated authority from the Attorney General and could not speak for or bind ICE. (*Id.* at 19:15–20:17.) The Court asked if the proceedings should be paused so the Assistant U.S. Attorney could locate someone with such authority from DHS. The Assistant U.S. Attorney declined the invitation. (*Id.* at 20:15–21:22.) Notably, it also became clear at the March 22 hearing that the Assistant U.S. Attorney *had* been in contact with a DHS attorney and had suggested that defense counsel speak with that DHS lawyer on matters related to future immigration proceedings brought against Reyes-Romero. (*Id.* at 39:20–40:10.) Apparently the DOJ could and did actually communicate with DHS about matters of interest to it, but elected to remain robustly ignorant as to the matters specifically raised by the Court.

This, combined with the Government's contradicting articulations for dismissal of the Indictment without adjudication on the merits of the § 1326(d) defense, led the Court to conclude at that March 22 hearing that it had "a reasonable basis to believe the Department of Homeland Security

want[ed] the indictment dismissed so it can rely on [the 2011 Removal Order]," in spite of the Court's tentative findings that such Removal Order was contrary to law. (ECF No. 77, at 54.) The Government did not dispute the Court's observations, nor could it after taking the position that it was simply not privy (and would and could not become privy) to the decision-making of DHS.

In the end, the parties completed briefing on the cross motions to dismiss, which included extensive briefing by both sides on the § 1326(d) prejudice issue. The Court ultimately ruled for Reyes-Romero. (Order, ECF No. 93.) It held that Reyes-Romero met his burden to show all three elements of the § 1326(d) affirmative defense and that the 2011 Removal order was invalid. (Op., ECF No. 92; ECF No. 93.) In the same Opinion and accompanying Order, the Court denied the Government's motion to dismiss, concluding that the evasive (and at times affirmatively deceptive) maneuvers in this case by the federal government writ large demonstrated a real risk of prosecutorial harassment against Reyes-Romero, in the form of likely removal proceedings following the dismissal of the Indictment in which DHS would rely on the invalid 2011 Removal Order.[20] (Op. at 54–55.)

II. Legal Standard

The "Hyde Amendment" refers to the statutory provision that gives district courts the authority to award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation

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[20] Reye-Romero's Motion for Release on Bond was dismissed as moot in light of the dismissal of the Indictment. (July 2, 2018, Order, ECF No. 93 ¶ 2.)

expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith. The Hyde Amendment reads,

> [T]he court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) . . . may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412].

18 U.S.C. § 3006A (statutory note).

Our Court of Appeals discussed the Hyde Amendment legal analysis in detail in *United States v. Manzo*, 712 F.3d 805 (3d Cir. 2013). It explained:

> [T]he Hyde Amendment places a daunting obstacle before defendants who seek to obtain attorney fees and costs from the government following a successful defense of criminal charges. In particular, a defendant must show that the government's position underlying the prosecution amounts to prosecutorial misconduct—a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous. The defendant bears the burden of meeting any one of the three grounds under the statute, and acquittal by itself does not suffice.

> That burden is made more difficult by the approach courts take in assessing the government's litigation position. In determining whether a position is vexatious, frivolous or in bad faith, courts make only one finding, which should be based on the case as an inclusive whole. A count-by-count analysis is inconsistent with this approach. In addition, when the legal issue is one of first impression, a court should be wary of awarding fees and costs so as not to chill the ardor of prosecutors and prevent them from prosecuting with earnestness and vigor.

Manzo, 712 F.3d at 810 (internal quotations and citations omitted). Here is what *Manzo* teaches:

- The position of the United States is vexatious when it is both (1) "objectively deficient, in that it lack[s] either legal merit or factual foundation," and (2) viewed objectively to be the product of "maliciousness or an intent to harass or annoy." *Id.* (quoting *United States v. Knott*, 256 F.3d 20, 29 (1st Cir. 2001)).
- The position of the United States is frivolous when it is "groundless[,] with little prospect of success." *Id.* (quoting *United States v. Gilbert*, 198 F.3d 1293, 1299 (11th Cir. 1999)). A frivolous position includes a position that is foreclosed by binding precedent, obviously wrong, lacking a reasonable basis, or lacking a reasonable expectation of attaining sufficient material evidence by the time of trial, but a position is not frivolous merely because it lacks precedent. *Id.* at 810–11 (collecting cases describing "frivolousness"). "A 'frivolous'

position can be distinguished from a 'vexatious' one in that 'the term vexatious embraces the distinct concept of being brought for the purpose of irritating, annoying, or tormenting the opposing party.'" *Id.* at 811 (quoting *United States v. Heavrin*, 330 F.3d 723, 729 (6th Cir. 2003)).

- The position of the United States demonstrates bad faith when there is an implication of conscious wrongdoing. It is an objective inquiry that focuses on whether the Government acted upon "a state of mind affirmatively operating with furtive design or ill will." *Id.* (quoting *Gilbert*, 198 F.3d at 1299).

Under the Hyde Amendment, "[w]hen assessing whether the 'position of the United States was vexatious, frivolous, or in bad faith,' the district court should therefore make only one finding, which should be based on the 'case as an inclusive whole.'" *Heavrin*, 330 F.3d at 730 (quoting *Comm'r, INS v. Jean*, 496 U.S. 154, 162 (1990)); *see also Manzo*, 712 F.3d at 810–11 (quoting *Heavrin*).

> Evaluating a case as an inclusive whole is not susceptible to a precise litmus test. The fact that only one count among many is frivolous or not frivolous is not determinative as to whether a movant should receive an award under the Hyde Amendment. Even if the district court determines that part of the government's case has merit, the movant might still be entitled to a Hyde Amendment award if the court finds that the government's "position" as a whole was vexatious, frivolous, or in bad faith. By the same

> token, a determination that part of the government's case is frivolous does not automatically entitle the movant to a Hyde Amendment award if the court finds that the government's "position" as a whole was not vexatious, frivolous, or in bad faith. The district court, in other words, must not fail to see the forest for the trees.

Heavrin, 330 F.3d at 730. Again, the district court must "inquire into the merits of the entire case," assessing it as an "inclusive whole." *Id.* at 731.

In addition to requiring that the Government's position be vexatious, frivolous, or in bad faith, recovery under the Hyde Amendment is subject to additional restrictions and procedures set forth in the EAJA, 28 U.S.C. § 2412(d), none of which are contested here.[21] *United States v. Claro*, 579 F.3d 452, 457 (5th Cir. 2009) joining consensus among circuits that the Hyde Amendment incorporates only those procedures and limitations in subpart (d) of 28 U.S.C. § 2412 and collecting cases); *United States v. Adkinson*, 247 F.3d 1289, 1291 n.1 (11th Cir. 2001).

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[21] The Government made no objections related to Reyes-Romero's § 2412(d) qualifications, so the Court will not address the application of those provisions here. *See Scarborough v. Principi*, 541 U.S. 401, 414 (2004) (EAJA's § 2412(d)(1)(B) requirements do not concern a federal court's subject-matter jurisdiction); *Vasquez v. Barnhart*, 459 F. Supp. 2d 835, 836 (N.D. Iowa 2006) ("Because the [Supreme] Court has clarified that the requirements of section 2412(d)(1)(B) are not jurisdictional, but are ancillary to the court's judgment, the . . . requirements can be waived by the Government, as it is the Government whose interests are protected by the section's requirements.").

III. Discussion

The central question put before this Court is whether the position of the United States in the prosecution of Reyes-Romero was vexatious, frivolous, or in bad faith. Upon review of the record before the Court, viewing this case "as an inclusive whole," the Court finds and concludes that the position of the United States was both frivolous and in bad faith. *Manzo*, 712 F.3d at 810.

A. The Position of the United States Includes Reference to DHS

When reviewing "the position of the United States," the Court examines the litigation position of the DOJ through this District's U.S. Attorney's Office and the actions taken (or not taken) by the federal agency upon which the criminal case is based.[22] *See United States v. Holland*, 34 F. Supp. 2d 346, 360 n.25 (E.D. Va. 1999) (examining conduct of FDIC for purposes of determining Hyde Amendment petition);[23] *United*

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[22] The Hyde Amendment explicitly incorporates the procedures and limitations (except the burden of proof) provided for an award under 28 U.S.C. § 2412(d). *See Claro*, 579 F.3d at 457. That subsection specifically defines the "position of the United States" as two-fold: "the position taken by the United States in the civil action [and] the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(2)(D). "Accordingly, our decisions 'have consistently defined 'position of the United States' as 'not only the litigation position . . . but also the agency position [that] made the lawsuit necessary.'" *Taylor v. Heckler*, 835 F.2d 1037, 1040 (3d Cir. 1987) (quoting *Lee v. Johnson*, 801 F.2d 115, 116 (3d Cir. 1986) (Becker, J., dissenting from denial of petition for rehearing in banc)).

[23] In *Holland*, the court granted the Hyde Amendment petition and initially assessed a portion of the attorney's fees and expenses against the FDIC, but the court vacated its assessment

States v. Gardner, 23 F. Supp. 2d 1283, 1294–95 (N.D. Okla. 1998) (same with respect to IRS). Therefore, the Court's examination of the Government's position in this case must also incorporate record evidence of the actions and lack of actions by DHS in relation to the criminal prosecution.

The Court must also delineate what actions by DHS are deemed to be in relation to this criminal case. "[T]he scope of the record in any Hyde Amendment case must be determined by a review of all the facts and circumstances." *Gardner*, 23 F. Supp. 2d at 1295. The EAJA, incorporated into the Hyde Amendment, "specifically contemplates that the court will consider actions and events prior to the initiation of litigation." *Id.* In this case, the actions of DHS Officers in 2011 are part and parcel with the DOJ's 2017 criminal indictment. The 2011 Removal Order was a necessary element to the criminal charge, and the Government relied on that Removal Order (and the conduct therein) for a significant amount of time until it was forced to begrudgingly retreat from its position.[24]

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of damages against the FDIC because it recognized that the defendant's amended petition for an award was only brought against the DOJ and/or the U.S. Attorney's Office and the FDIC was not properly before the Court. The *Holland* Court acknowledged that a petition against "the United States" could be interpreted broadly enough to include other agencies of the United States Government, but in that particular case, "it appear[ed] that the Hollands purposefully did not seek relief against the FDIC . . . in their amended petition." 48 F. Supp. 2d 571, 580 (E.D. Va. 1999). Here, DHS has been given notice of the Fee Application by the Government and the Court interprets the Fee Application to include consideration of the conduct of DHS.

[24] When faced with a challenge to the validity of the 2011 Removal Order, the Government defended the series of events,

Even though the Government backed away from (but did not affirmatively disavow) those events later in the criminal prosecution, the Court concludes that the evidence in the record related to the conduct of DHS Officers in the 2011 Removal Proceedings is properly included in the scope of the record to be considered in the Court's examination of the position "of the United States" in this criminal case.[25] Although the Government argued against including the conduct of federal officers in 2011 in the Government's "position" for purposes of evaluating the Fee Application, it offered no legal support for why the events that it necessarily relied on to satisfy an element of the offense charged against Reyes-Romero should not also be included in the record here.

B. The Position of the United States Was Frivolous and in Bad Faith

The Court finds by a preponderance of the evidence[26] that the position of the United States was

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devoting an entire day's hearing to providing the Court with testimonial accounts of "what happened" in 2011 with the live testimony by the very DHS Officers involved.

[25] However, as explained below, the ultimate finding that the position of the United States was both frivolous and in bad faith would not be altered if the scope of the record excluded the conduct of DHS Officers in 2011, as the record evidence of the conduct by DHS from 2017 to present alone meets the standard for such a finding as it pertains to the agency prong of the "position of the United States."

[26] "[A] party moving for an award of attorney's fees under the Hyde Amendment must establish by a preponderance of the evidence that the government's position was vexatious, frivolous, or in bad faith." *United States v. Velardi*, No. 06-cv-00659, 2008 U.S. Dist. LEXIS 62257, at *4–5 (E.D. Pa. Aug. 14, 2008) (quoting *United States v. Truesdale*, 211 F.3d 898, 908 (5th Cir. 2000)).

both frivolous and in bad faith. The United States need not make a wrong turn at every corner to justify the imposition of a Hyde Amendment award, *Heavrin*, 330 F.3d at 730, but the misconduct of the United States at multiple key points before and during the criminal prosecution and on multiple key issues in this litigation was completely divorced from fact and law and demonstrated conscious wrongdoing.

The federal government plainly railroaded Reyes-Romero out of the country in 2011. The Court has already found and concluded that the Forms, completed in 2011, were "internally and inherently contradictory" to the point of being indiscernible as to any actual waiver of rights by Reyes-Romero. (Op. at 16.) The Court was able to reach this conclusion by examining the facial defects on the Forms. (*Id.* at 16–17.) With respect to the I-851, "[t]he Defendant signed the 'waiver' section before it was entirely explained to him in his native language, he signed the waiver section before it was served on him, and it was served on him before it was issued. In short, he supposedly signed away his rights before he was charged and before those rights were read to him in Spanish." (*Id.* at 17.) "[T]he involved Officers elect[ed] to run roughshod over not only what they testified were the standard and required DHS procedures, but also over any semblance of due process." (*Id.* at 19.) As extensively explained in this Court's July 2, 2018, Opinion and again here, the conduct by the DHS Officers in 2011 had no basis in law and easily meets the definition of "frivolous." It was contrary to what the DHS Officers stated was DHS policy, was foreclosed by binding authority (i.e. the due process clause of the Constitution), and was lacking in any

reasonable factual or legal basis. *Manzo*, 712 F.3d at 811.

Even if the scope of the Court's review did not extend to the DHS Officers' conduct in 2011, the 2018 testimony by those same DHS Officers about "what happened" in 2011 and their description and explanation about what the Forms "showed" demonstrates clear bad faith. The Court's conclusions in its July 2, 2018, Opinion that the Officers lied and were motivated to lie in a weak attempt to sell to the Court the nonsense they generated in 2011 plainly evidences "conscious doing of wrong." *Id.* This is not a case where law enforcement's misconduct "could just as well rested on an honest mistake of fact or misapprehension of the authority they had been granted." *Knott*, 256 F.3d at 31 (reversing district court's grant of Hyde Amendment award). Based on the Court's review of the record, its own examination of the witnesses, and its personal observations relative to the testimony in open Court, the Court confidently concludes that the DHS Officers were affirmatively acting with "furtive design." *Manzo*, 712 F.3d at 811.[27]

In *Knott*, the district court based its finding of vexatiousness on its "determination that there was 'credible evidence'" of altered sampling results that led to the EPA obtaining a federal search warrant, specifically that the final recorded measurement appeared to be written over a different measurement. 256 F.3d at 24, 31. The First Circuit, reversing the

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[27] Because those Officers well knew that they had cooked up Reyes-Romero's 2011 Removal, they too were bound by *Brady* to disclose what they had done and the documentary and testimonial evidence of their conduct. *Dennis*, 834 F.3d at 288.

district court, concluded that this determination by itself was insufficient to establish a vexatious prosecution because the record showed that other properly recorded samples also showed EPA violations and the district court made no findings as to *why* annotations had been altered, "just that there was 'credible evidence' that they may have been." *Id.* at 32. The First Circuit hypothesized that the alteration could have been for any number of reasons, "some as benign as the correction of a mistake." *Id.* "Since the existence of the purported alterations is equally open to benign and malign interpretations on the present record, it hardly provides sufficient evidence of vexatious conduct." *Id.*

Here, unlike *Knott*, the Court has already found that the DHS Officers' false testimony was given in an effort to "explain away prior testimony" of the Officers' misconduct during the 2011 Removal Proceedings. (Op. at 15.) The Court has also already found that the misconduct during the 2011 Removal Proceedings "[ran] roughshod over . . . the standard and required DHS procedures, but also over any semblance of due process." (*Id.*) Even though this Court in its previous Opinion only went so far as to state that it had "substantial doubt" that Reyes-Romero personally made the critical waiver notations, when viewing the specific facts of the case there simply is no "benign" explanation for a DHS Officer selecting a key waiver provision on behalf of a detainee who is plainly capable of marking and signing a document himself, especially when the testimony was that Reyes-Romero "held the pen." (*Id.* at 11 n.6.) Of course, this is just one "flaw" of many evidenced on the face of the Forms. There is no plausible "benign" explanation for the manner (and

order) in which the Forms were completed.[28] Both the 2018 false testimony and the 2011 conduct by the DHS Officers provide strong evidence of frivolousness and bad faith.[29]

The other prong of the "position of the United States," the position of the DOJ, was also frivolous and in bad faith. First, the DOJ relied upon the facially invalid waivers to indict and seek to prove the necessary element that Reyes-Romero "had been previously deported and removed from the United States *pursuant to law*." (ECF No. 1.) The Government's reliance on the black-and-white copies of the Forms was obviously flawed. The Forms facially demonstrate that there was no valid waiver due to their patent inconsistency, so the Government's position "lack[ed] a reasonable expectation of attaining sufficient material evidence by the time of trial." *Manzo*, 712 F.3d at 811. There is no better evidence of this than the fact that when the Government put on witnesses (who it purports to have interviewed prior to putting them on the stand) to explain the facial defects, things inexorably went from bad to worse as their testimony shifted from

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[28] The simplest explanation could have been that the times on the Forms were rounded or that different clocks were used to note different times. Both of these explanations were ruled out by the Officers' own testimony. (*See* Op. at 10 n.5, 14.)

[29] So that there is no doubt, in light of the specific analysis the Court is now required to make in the Hyde Amendment context, the Court finds, based on the Court's examination of the color copies and its consideration of the testimonial record, that Reyes-Romero did not place the blue markings on the I-826 where he purported to waive a hearing. Rather, one of the DHS Officers made that notation.

essentially incoherent to false. *Cf. United States v. Capener*, 608 F.3d 392, 401–02 (9th Cir. 2010) (Government's position was not frivolous when there was no evidence that the Government had any affirmative reason to believe its theory was wrong.).

While the Government's position with respect to the Forms was certainly and woefully mistaken at the time of Indictment and likely up to the first hearing, its position following the testimony of its witnesses transitioned from mistake to misconduct (as a term of art used in the Hyde Amendment context) as there were ample "affirmative reason[s] for the [G]overnment to know such reliance [was] misplaced." *Id.* at 402. The Government continued to advocate that the 2011 Removal Proceedings were conducted pursuant to law, long after the DHS Officers presented testimony that was rife with internal and inherent contradictions and long after the Court found and stated that material portions of that testimony were lies.[30] The Government stuck to this position even after one DHS Officer admitted on the stand that his testimony (given just moments before) was, in fact, nonsense,[31] and even after the Court gave the Government an opportunity to "stop and think" before the Government pressed on. Even after it filed its own motion to dismiss the Indictment with prejudice, the Government did not back away from its litigation position as to the validity of the waivers. Only after

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[30] The Court will revisit the Government's treatment of the Officers' testimony later in this Opinion.

[31] He confirmed that his testimony did not "make any sense." (Op. at 22.) The absence of a statement making sense is commonly referred to as "nonsense."

the Court reminded the Government (two months later) at the March 2, 2018, hearing that it could not play dodgeball with the Court and would have to take a position on the truthfulness of its own witnesses' testimony did the Government back away from its "valid waiver" arguments. And even then, the Government only ceased "present[ing] argument" on the elements, refusing to simply concede the first two elements of § 1326(d). (ECF No. 67, at 7.) This fits comfortably within *Manzo*'s definition of a frivolous position. *Manzo*, 712 F.3d at 810–11.

The Government argues that its ultimate decision to move on from its valid waiver argument is enough to absolve it of its earlier conduct. The Court does not agree. It took the Government over two months, filled with extensive litigation and multiple opportunities, to "see the light." *Cf. United States v. Lain*, 640 F.3d 1134, 1139 (10th Cir. 2011) (When the Government acts "promptly to correct its error," it is less likely that its conduct is vexatious, frivolous, or in bad faith.) To the extent that the Government had an opportunity (months later) to negate evidence of its frivolousness by sufficiently correcting its earlier position, it lost that opportunity because it did not, in fact, correct that misconduct. The Government simply ignored it.

The Government's position with respect to its "valid waiver" argument demonstrates frivolousness, as did its position with respect to its witnesses' testimony. DHS Officers (admittedly) testified nonsensically on the stand and did so in an effort to shield their misconduct in 2011, and the Government stood by what the Court expressly found was false and incredible testimony.

The Court criticized this approach in its prior Opinion, stating that such a noncommittal position with respect to the credibility of the Government's own witnesses is contrary to law, citing *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974). (Op. at 60.) The Government argues that its conduct in this prosecution is not of the egregious type admonished in *Harris*, where the Government had remained silent while a witness disclaimed a fact known to the Government to be true. 498 F.2d at 1168. The Government here asserts that because this Court never made a finding that the Government *knew* that the DHS Officers testified to a fact that was false (or disclaimed a fact that the Government knew to be true), the Government's shift from affirmatively advancing the testimony to a not-adopt-but-not-disavow position conforms with its obligations under *Harris*.

That is "slicing the baloney mighty thin." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018).

Within moments of hearing one DHS Officer's testimony, the Court asked the Officer if his own testimony made any sense to him (to which the Officer answered that it did not), and then the Court immediately recessed proceedings to explicitly give the parties (really, just the Government) time to process that testimony. The fact that the Court concluded that the Government did not knowingly *present* false testimony[32] does not mean that once the Government

[32] There is insufficient evidence in the record from which the Court would conclude, here and now, that the Government knowingly presented false testimony, and Reyes-Romero chose not to seek to develop or introduce evidence related to the Government's pre-hearing interviews of its witnesses. (*See* ECF

heard from its own witnesses what was plainly self-serving prevarication which contradicted the Forms on which the Government had relied, it had "the luxury of taking a position of ambivalence." (Op. at 19 n.12.) *See also Banks v. Dretke*, 540 U.S. 668, 672, 675–76 (2004) (admonishing the government for allowing false testimony to stand uncorrected and holding that when law enforcement conceals "significant exculpatory or impeaching material," the government has a duty to "set the record straight"). Furthermore, the Court is confident that had it not repeatedly inquired into the Government's non-committal position as to its own witnesses' testimony, the Government would not have even considered whether to reconsider its position of affirmatively advancing that testimony.

The conduct of the United States in this litigation, considered as a whole, was groundless in law and in fact. *See Adkinson*, 247 F.3d at 1293 (When the government's prosecutorial position is groundless in law "not only when the [G]overnment brought the indictment, but also throughout the presentation of its case-in-chief," it is an abuse of discretion to *deny* a Hyde Amendment award.). This case closely resembles *United States v. Braunstein*, in which the

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No. 105, at 14 n.3 (Government produced notes of those interviews to defense counsel on January 2, 2018).) However, it is difficult to discern what the factual account from those witnesses could possibly have been during those interviews that would have explained away the facial defects on the Forms so as to persuade the Government to put on the testimony, and if the pre-hearing witness interviews matched the testimony actually presented, it is difficult to imagine why the Government thought calling those witnesses was either appropriate or even legitimate.

Ninth Circuit reversed the district court's denial of a Hyde Amendment award. 281 F.3d 982, 996 (9th Cir. 2002). The Ninth Circuit concluded that the DOJ had acted frivolously when they brought a prosecution for fraud despite having substantial information that the alleged victim of the fraud could not have been deceived by the alleged fraudulent acts. *Id.* The well-documented evidence showed that the Government's theory of the case "was so obviously wrong as to be frivolous." *Id.* The same is true here. The Government's position that Reyes-Romero was previously removed from this country *pursuant to law* based on his waiver of rights is "so obviously wrong as to be frivolous." *Id.* Like in *Braunstein*, the fact that the Government eventually moved to dismiss the Indictment is insufficient to overcome its frivolous position. *Id.* at 991 (After the district court denied the motion for a continuance of the trial date, the Government moved to dismiss Braunstein's indictment.)

This is not a case where there was "simply [] a witness whose testimony directly inculpate[d] the defendant [was] arguably not credible," which the Second Circuit has held is alone insufficient to support a Hyde Amendment award. *United States v. Bove*, 888 F.3d 606, 611 (2d Cir. 2018). For starters, the evidence of the 2011 Removal Proceeding via the Forms demonstrated serious holes in the Government's theory of the case before a single witness testified, obliterating any hope of success on two of the three § 1326(d) elements. In any event, the Government's witnesses did not merely present "not credible" testimony. *Id.* The witnesses' testimony in this case was self-described as nonsensical, and its facial

inconsistency and incoherence demonstrated that at least material parts of it were false. The black-and-white copies of the Forms facially demonstrated that the Government's "waiver of rights" position did not ever hold water, and the color copies of the Forms removed all doubt. There was no evidence presented that lent a scintilla of support for the Government's contention that the 2011 Removal Proceeding was conducted pursuant to law. *Cf. Bove*, 888 F.3d at 611 n.29 (Government submitted an affidavit that it had another witness and other evidence to support its theory of the case).

The conduct described thus far sufficiently tainted the entire criminal prosecution with frivolousness and bad faith such that the position of the United States as a whole would meet the standard for an award under the Hyde Amendment. However, there is additional evidence of bad faith in the record for the Court to consider.

The Government's attempted maneuvers to shield the 2011 Removal Order from an adjudication of invalidity demonstrates at best a position lacking any reasonable basis and at worst a course of conscious impropriety. As this Court held in its prior Opinion:

> The Government was willing to dismiss its own Indictment with prejudice, but it would not consent to the Court's granting of the Defendant's Motion to Dismiss. (Tr. of Proceedings, ECF No. 57, 6:18–24, 30:5–7.) The difference between the "cross" Motions to Dismiss Indictment is that the Defendant's Motion to Dismiss, now granted, attacks the validity of the underlying 2011 Removal Proceeding. The ultimate effect of

> granting the Defendant's Motion to Dismiss on its merits on any future removal proceedings against the Defendant is uncertain, as that issue in the first instance is for an immigration court (and perhaps ultimately the Court of Appeals). But without an adjudication of the Defendant's Motion (or the Government's concession to it), the conduct and result of the 2011 Removal Proceeding would be shielded from public examination, notwithstanding that the Government relied on that very Removal Proceeding in seeking the Defendant's Indictment. This is important since, as the Government conceded at the hearings in this case, the United States could (and may well) simply now seek to rely on the 2011 Removal Process, the fatally flawed Forms, and the resulting 2011 Removal Order in this case in future removal proceedings. (ECF No. 77, 37:23–38:12.)

(Op. at 52.) Furthermore, the United States "steadfastly refused to provide any assurance that the Forms, and the 2011 Removal Proceeding, will not be relied upon in future proceedings against the Defendant." (*Id.* at 52.) To justify its drawn veil over DHS actions, the Government invoked what this Court has termed, "a bureaucratic wall within the Executive Branch," in which the DOJ brought a motion to dismiss a criminal indictment, but then asserted that any future immigration proceedings, where "liberty itself may be at stake," are solely within the purview of the DHS. (*Id.* at 55–56 (quoting *Young v. United States*, 481 U.S. 787, 810 (1987)).) As this Court previously explained,

> "While the Department of Justice has decided that it will seemingly not pursue the Defendant further on this criminal charge in this Court, its lawyers, lawyers for the United States, have declined to affirmatively disclaim that the federal Executive Branch won't continue to fully rely on the Forms or the 2011 Removal in any upcoming Removal (or other) proceedings as to the Defendant—Forms and a process which the Court has described as 'wholly unlawful.'"

(Op. at 56.)

The Government defends DOJ's isolationist position, pointing to cases describing the limits of a U.S. Attorney's authority to bind other executive departments. *See, e.g.*, *United States v. Igbonwa*, 120 F.3d 437, 444 (3d Cir. 1997) ("[A] promise made by the United States Attorney's Office relating to deportation does not bind the INS *without explicit authority from the INS*." (emphasis added)). The Court agrees with the Government that the U.S. Attorney's Office may perforce not have blanket authority to bind other parts of the Executive Branch, but in light of the intertwining activity of DHS and DOJ in *this* case, *Igbonwa* also begs the question here: did the United States Attorney's Office not seek such authority from DHS or did DHS not give that authority? Either way, it became clear in this case that the federal government was attempting to manipulate the system to have it both ways. This is an abuse of both the administrative and judicial process that is profound evidence of bad faith for Hyde Amendment purposes.

At the time the DOJ filed its motion to dismiss, it had adopted the position that the DOJ is "some sort of

stranger to the important work of formulating federal immigration policy and leading its enforcement." (Op. at 57.) But one need not look further than this case for an example of the interdepartmental cooperation between the DHS and the DOJ with respect to immigration matters. The underlying administrative proceeding, the 2011 Removal (completed entirely by DHS), "play[s] a critical role in the subsequent imposition of [the] criminal sanction." *Mendoza-Lopez*, 481 U.S. at 837–38. Reyes-Romero was then arrested by "a fugitive operations team" comprised of DHS's enforcement officers. (Gov't Br., ECF No. 17, at 2; Tr. of Proceedings on Jan. 4, 2018, ECF No. 31, at 125:15–19.) Of course, at this point, the federal government had a choice as to whether to proceed only with new administrative removal proceedings or to "invite[] judicial scrutiny of the underlying removal order by instigating a criminal prosecution under § 1326." *Villa-Anguiano v. Holder*, 727 F.3d 873, 880 (9th Cir. 2013).[33] In this case, the DOJ pursued a criminal prosecution.

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[33] The Government cites to *Villa-Anguiano* for the premise that "judicial invalidation of a prior order of removal does not categorically bar reinstatement of the same order by ICE." (ECF No. 105, at 30.) *Villa-Anguiano* held that "when, as a result of [invited judicial] scrutiny, a district court finds constitutional infirmities in the prior removal proceedings that invalidate the prior removal for purposes of criminal prosecution, the agency *cannot* simply rely on a pre-prosecution determination to reinstate the prior removal order." 727 F.3d at 880 (emphasis added). Instead, if an agency wishes to reinstate an invalidated removal order, it must follow regulatory requirements that provide the alien with an opportunity to be heard and that mandate the agency to "independently reassess whether to rely on the order . . . or instead to instigate full removal proceedings."

Then, at every hearing except one, the DOJ had a DHS Officer at counsel table.[34] The DOJ relied upon (1) the fugitive operations efforts of DHS to arrest Reyes-Romero, (2) the actions of DHS both in regard to the 2011 Removal and at the time of indictment to bring this criminal prosecution against Reyes-Romero, (3) testimony from DHS agents to defend its prosecution against Reyes-Romero's affirmative defense, and (4) DHS Officers were seated at counsel table throughout the case. But when the possible future actions of DHS were placed front and center by the Government's own motion to dismiss, the "Government" took the position that it could not speak for or on behalf of DHS. Even when the Court offered to pause the proceedings so the DOJ could confer with DHS or reach out to someone from DHS who had authority to speak on its behalf and answer the Court's questions, the DOJ declined, even though when Reyes-Romero asked (outside the presence of the Court) questions about immigration proceedings, the DOJ put him in touch with counsel from DHS.

Id. This certainly affords an alien more due process protections than the scenario in which the prior removal order is not invalidated by an Article III court.

[34] A DHS Agent was present at counsel table on both the January 3 and March 22, 2018, hearings and oral arguments. (ECF No. 30, at 2:6–8; ECF No. 77, at 3:18–20.) A different DHS Agent was present at counsel table on both the March 1 and 2, 2018, hearings and oral arguments. (ECF No. 57, at 2:6–8; ECF No. 58, at 2:8–10.) The transcript of proceedings on January 4, 2018, did not establish one way or another whether anyone else was seated at counsel table with the Assistant U.S. Attorney. (ECF No. 26.) For a discussion of the DOJ's response on the Court's request to involve DHS in the case to resolve questions that the DOJ purported it could not answer, see *supra* Part I.D.

The Government invoked DHS as a sword against Reyes-Romero when such a tactic benefitted its prosecution. Yet it obstructed the Court's "independent responsibilities to protect certain rights, interests, and duties" necessary to grant the Government leave of Court to dismiss the indictment by suddenly invoking the bureaucratic wall it itself had erected between the DOJ and DHS. (Op. at 55 (citing *In re Richards*, 213 F.3d 773, 788 (3d Cir. 2000)).) When the Court combines this with the confusing (and often contradictory) reasons asserted by the Government for seeking dismissal of the Indictment, the Court is left with the conclusion that the position of the United States in this case was the product of the DOJ's conscious abuse of the judicial process resulting from and in furtherance of inter-agency cooperation between the DOJ and DHS.

Here is why that is the case. First, the Government claimed it wanted to dismiss the Indictment to save litigation resources, yet when its motion was taken under advisement, the Government then expended substantial resources on continuing to oppose Reyes-Romero's motion to dismiss. Second, the outcome for the DOJ under both motions to dismiss was the same: a bar from bringing a subsequent indictment against Reyes-Romero for reentry of removed alien based on these facts. Despite this, the DOJ did press on, expending resources and time to oppose any adjudication that would render the 2011 Removal invalid—an adjudication that would only impact and affect DHS. The Court concluded in its Opinion that this conduct was "taint[ed] with impropriety," Op. at 55–56, and stems from the Government's "principal motivation" to avoid "an adjudication relative to the

validity of the process used to engineer the 2011 Removal." (Op. at 55.)

Whether the endgame of all this was to enable DHS to simply recycle Reyes-Romero's 2011 Removal Forms with no impediments arising from its own misconduct in later removal proceedings or to cover up DHS's egregious constitutional violations (or both) is unknown. Either way, the DOJ (if it truly was divorced from DHS's interests and actions) should have been wholly ambivalent as to how the Indictment was dismissed, as the impact of dismissal via either its motion or Reyes-Romero's motion would have been the same vis-à-vis the DOJ. The *only* agency it could have made any difference to was DHS. Given that reality, the Court is compelled to conclude that the DOJ's representations to the Court that its actions were not being driven by the interests of DHS were simply baseless.

Finally, there is the lingering issue of the late-arriving color copies of the Forms. Reyes-Romero has not disputed the Government's assertion that the DOJ was unaware of the vivid amplification of the content of the black-and-white versions of the Forms via the color copies. But DHS obviously did possess the color copies at the commencement of this prosecution (evidenced by the reality that it had originally created the documents and, upon specific request, produced the color copies). There is a clear implication of conscious wrongdoing when the color copy of the I-826 shows a crucial marking attributed to Reyes-Romero in the identical color of the pen used by the DHS Officer (and not the pen used by Reyes-Romero) and yet only a black-and-white copy was submitted to the U.S. Attorney's Office when the Forms were placed

into controversy.[35] The Court need not conclude, for purposes of deciding the pending Fee Application, that DHS's failure to timely disclose the color copies until specifically asked by the U.S. Attorney's Office constitutes a *Brady* violation, because it is enough for the Court to conclude that their failure to do so sufficiently shows Hyde Amendment bad faith.

The Government's remaining arguments in opposition to the Fee Application are unpersuasive. It argues that a granting of a Hyde Award in this case would conflict with the Eighth Circuit's decision in *United States v. Monson*, where the Eighth Circuit affirmed the district court's denial of Hyde Amendment award. 636 F.3d 435, 439–40 (8th Cir. 2011). In *Monson*, the district court made a *Franks* ruling in favor of the defendant, which "constitutes a finding that law enforcement deliberately lied or recklessly disregarded the truth when they included information in an affidavit used to obtain a warrant." *Id.* at 439 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). The Eighth Circuit held that "[a] *Franks* ruling does not necessarily mean that government prosecutors (assuming they did not participate in the preparation of the affidavit) deliberately lied or acted with a reckless disregard for the truth." *Id.* Instead of "automatically concluding" that the position of the United States was frivolous or vexatious for purposes of a Hyde Amendment award, the district court must "consider the individual facts of the case." *Id.* In

[35] Of course, this issue is completely separate from the argument advanced by the Government that the I-826 was actually a pointless document completed for no reason whatsoever. That argument was plainly frivolous.

evaluating whether the position of the prosecutors was frivolous, the Eighth Circuit examined the Government's arguments on whether there was a *Franks* violation. *Id.* at 440. The Eighth Circuit concluded that each argument that the Government made with respect to the *Franks* motion was non-frivolous. *Id.* at 440–41. This Court has followed *Monson*, first identifying the dishonest conduct of the DHS Officers and then analyzing the position of the Government based on the specific facts of the case. The Court has determined that the Government here made frivolous arguments both stemming from, and also completely independent from, the misconduct of its witnesses. This significantly distinguishes this case from *Monson*.[36]

Lastly, the Government argues that because this Court must view the case as a whole, its lack of misconduct with respect to other litigation events and arguments outweighs the evidence of Hyde

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[36] Also, the court of appeals in *Monson* was reviewing the district court's denial of a Hyde Amendment award under the abuse of discretion standard, the same standard applied in this circuit. *Manzo*, 712 F.3d at 809. Interestingly, the *Monson* dissent concluded that the district court made a legal error and reviewed the record to determine whether that error was harmless. In this less deferential review, the dissent noted that "there [were] material facts in the record from which a reasonable trier of fact could hold 'the position of the United States' was 'in bad faith.'" 636 F.3d at 443–44 (Riley, C.J., dissenting) (quoting Pub. L. No. 105-119). "The United States typically is responsible for the knowledge and actions of state law enforcement officers acting on its behalf. Evidence exists that the prosecutor knew, or should have known, of the law enforcement officers' material falsehoods and omissions yet pursued an indictment against Monson." *Id.* at 445 (internal citation omitted).

Amendment misconduct. The Court does not agree that this "good" (or at least, lack of misconduct) sufficiently outweighs the "bad" in this case. *Heavrin*, 330 F.3d at 730 ("Even if the district court determines that part of the government's case has merit, the movant might still be entitled to a Hyde Amendment award if the court finds that the government's "position" as a whole was vexatious, frivolous, or in bad faith.").

The Government's legal arguments as to the prejudice issue (e.g., whether Reyes-Romero would have been eligible for asylum, Convention Against Torture protection, or withholding of removal), although completely unsuccessful, did not brush up against any prosecutorial misconduct. Its legal arguments on these matters were largely reasonable and based in law, and this Court devoted a large portion of the July 2, 2018, Opinion to navigating the merits of each argument as argued by both parties. But, as the timeline of the case demonstrates, the prejudice issue was one that was almost entirely litigated on the papers, with the exception of some testimony by Reyes-Romero's family members at the January 4, 2018, proceeding. The prejudice issue was an issue that could have and should have been addressed immediately and swiftly after Reyes-Romero filed his motion to dismiss. Rather, this case was overwhelmingly and unnecessarily drawn out by the various litigation tactics taken by the Government and described above as to the waiver and form of dismissal issues.

Furthermore, the Government's argument completely ignores *Charleswell*'s "presumption of prejudice" rule, which this Court actually applied in

its July 2, 2018, Opinion and Order. *Charleswell* provided that where procedural defects are "so central or core to a proceeding's legitimacy," prejudice may be presumed. 456 F.3d at 362 n.17. The Court determined that the presumption of prejudice applied in this case,[37] not just because of what happened in 2011, but also because of the DHS Officers' testimony and the DOJ's unwillingness to "set the record straight" on what happened in 2011. As this Court stated in its July 2, 2018, Opinion, "any actual understanding and exercise of his rights by the Defendant was stopped dead in its tracks by the DHS Officers who steered the Defendant to waive away his rights (or did it for him) before providing an explanation of such rights to the Defendant." (Op. at 50.) But most relevant to the Court's analysis here, "the dissembling and convoluted testimony of the DHS Officers clouded any opportunity for this Court to get an accurate idea of what actually happened in the 2011 Removal Proceeding." (*Id.*) Of course, that was exacerbated by the DOJ's motion to dismiss asking the Court to not rule on the validity of the 2011 Removal Order.

The Government argues now that it should not "be held liable under the Hyde Amendment for positions it never took on issue that were never litigated." (ECF No. 105, at 24 n.12.) It is entirely disingenuous for it to argue that this point was "never litigated." *Charleswell* was *the* seminal case addressing § 1326

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[37] That the Court did not simply stop with that conclusion but, out of completeness, ruled on every "prejudice" argument advanced by any party is in this Court's judgment of no moment for the Hyde Amendment analysis in this case.

and driving both parties' arguments from the beginning of the case to the end of the prosecution. As professors lecture law students, the reader disregards footnotes in judicial opinions (especially those from our own Court of Appeals) at her own peril.[38]

The Government's lack of response on the issue of presumed prejudice is not inculpatory evidence of bad faith or frivolousness, but it is not exculpatory either. Rather, it undercuts the United States' reasoning that its conduct during the prejudice portion of the case excuses its misconduct elsewhere in the case. The prejudice issue was but one tree in the forest, and, in this case, is not an arboreal life raft. *See Heavrin*, 330 F.3d at 730. The Government's ability to not commit misconduct during that one segment of this case does not override the multiple episodes of established misconduct, considering the proceeding as one inclusive whole.

Based on all of the circumstances of this case and viewing this case as a whole, the Court finds by a preponderance of the evidence and concludes as a legal matter that the position of the United States was frivolous and in bad faith. The Hyde Amendment ensures that the financial burden of withstanding such a prosecution does not fall on the acquitted defendant, and Reyes-Romero will be awarded attorney's fees and litigation costs incurred in defending this case.

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[38] "[T]o one digging into the bowels of the law, a fat footnote is a mother lode, a vein of purest gold." Edward Becker, *In Praise of Footnotes*, 74 Wash. U. L. Q. 1, 6 (1996) (quoting Stanley H. Fuld, *A Judge Looks at the Law Review*, 28 N.Y.U. L. Rev. 915, 919 (1953)).

C. Amount of Award

To support a Hyde Amendment award, "the prevailing party is required, inter alia, to 'submit to the court an application for fees and other expenses . . . [showing] the amount sought, including an itemized statement from any attorney . . . representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.'" *Claro*, 579 F.3d at 457 (quoting 28 U.S.C. § 2412(d)(1)(B)). Reyes-Romero attached to his brief in support of the Fee Application a declaration from his counsel that included the counsel's resume and a statement of his billings in this case. (*See* ECF No. 96, amended at ECF No. 107.)[39] In its brief in opposition to the Fee Application, the Government requested that, in the event the Court concludes that Reyes-Romero is entitled to a Hyde Amendment award, it be given an opportunity to submit "supplemental briefing regarding 'whether an increase in the cost of living or a special factor justifies an award above the fee cap. 28 U.S.C. § 2412(d)(2)(A).'" (ECF No. 105, at 33.) While the Court does not ordinarily endorse piecemeal responsive briefing, the Court will defer its decision on the amount of the award pending further briefing and hearings, as needed, on that point. The Government did not object to, or request further briefing as to, the "actual time expended" by Reyes-Romero's counsel or the recoverability of any incurred expenses.

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[39] Counsel for Reyes-Romero updated his statement of billings to include attorney's fees for this Application for Fees. (*See* ECF 107-2.)

Therefore, those matters are now closed. The only issue to be resolved is the appropriate hourly rate.

IV. Conclusion

Reyes-Romero is entitled to a Hyde Amendment award. He shall receive $1,007 in expenses plus 242.5 hours' worth of attorney's fees, the rate at which those fees will be calculated to be determined by this Court in further proceedings.

An appropriate Order will issue.

/s/ Mark R. Hornak
Mark R. Hornak
Chief United States District Judge

Dated: March 6, 2019
cc: All counsel of record

Exhibit
A

U.S. Department of Homeland Security

Notice of Rights and Request for Disposition

Subject ID : [redacted] Event No: [redacted]
FINS #: [redacted] File No: [redacted]

Name: Mario REYES(AKA: REYES,MARIO)

NOTICE OF RIGHTS

You have been arrested because immigration officers believe that you are illegally in the United States. You have the right to a hearing before the Immigration Court to determine whether you may remain in the United States. If you request a hearing, you may be detained in custody or you may be eligible to be released on bond, until your hearing date. In the alternative, you may request to return to your country as soon as possible, without a hearing.

You have the right to contact an attorney or other legal representative to represent you at your hearings, or to answer any questions regarding your legal rights in the United States. Upon your request, the officer who gave you this notice will provide you with a list of legal organizations that may represent you for free or for a small fee. You have the right to communicate with the consular or diplomatic officer from your country. You may use a telephone to call a lawyer, other legal representative, or consular officer at any time prior to your departure from the United States.

REQUEST FOR DISPOSITION

Initials ☒ I request a hearing before the Immigration Court to determine whether or not I may remain in the United States.

Initials ☐ I believe I face harm if I return to my country. My case will be referred to the Immigration Court for a hearing.

Initials ☒ I admit that I am in the United States illegally, and I believe that I do not face harm if I return to my country. I give up my right to a hearing before the Immigration Court. I wish to return to my country as soon as arrangements can be made to effect my departure. I understand that I may be held in detention until my departure.

Mario [redacted] 6-23-11
Signature of Subject Date

CERTIFICATION OF SERVICE

☒ Notice read by subject.

☒ Notice read to subject by JOSE ALCOTA, in the SPANISH language.

T. DARTE JO — JOSE ALCOTA, SIDA
Name of Officer (Print) Name of Interpreter (Print)

[redacted] 6-23-11 9 PM
Signature of Officer Date and Time of Service

Form I-826 (Rev. 08/01/07)

App.106

Exhibit
B

Notice of Intent to Issue a Final Administrative Removal Order

In removal proceedings under section 238(b) of the Immigration and Nationality Act

Event No: [redacted]
File Number [redacted]

To: Mario REYES AKA: REYES, MARIO

Address: CRAF STATE PRISON TRENTON MERCER NJ UNITED STATES
(Number, Street, City, State and ZIP Code)

Telephone:
(Area Code and Phone Number)

Pursuant to section 238(b) of the Immigration and Nationality Act (Act) as amended, 8 U.S.C. 1228(b), the Department of Homeland Security (Department) has determined that you are amenable to administrative removal proceedings. The determination is based on the following allegations:

1. You are not a citizen or national of the United States.
2. You are a native of EL SALVADOR and a citizen of EL SALVADOR
3. You entered the United States (at)(near) Unknown place on or about Unknown date
4. At that time you entered Unknown Place
5. You are not lawfully admitted for permanent residence.
6. You were, on December 11th, 2009, convicted in the New Jersey Superior Court
   Hudson County for the offense of Aggravated Assault
   in violation of N.J.S.A. 2C:12-1b(1)
   for which the term of imprisonment imposed was 3 years

Charge:
You are deportable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii), as amended, because you have been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act, 8 U.S.C. 1101(a)(43)(F).

Based upon section 238(b) of the Act, 8 U.S.C. 1228(b), the Department is serving upon you this NOTICE OF INTENT TO ISSUE A FINAL ADMINISTRATIVE REMOVAL ORDER ("Notice of Intent") without a hearing before an Immigration Judge.

Your Rights and Responsibilities:
You may be represented (at no expense to the United States government) by counsel, authorized to practice in this proceeding. If you wish legal advice and cannot afford it, you may contact legal counsel from the list of available free legal services provided to you.

You must respond to the above charges in writing to the Department address provided on the other side of this form within 10 calendar days of service of this notice (or 13 calendar days if service is by mail). **The Department must RECEIVE your response within that time period.**

In your response you may: request, for good cause, an extension of time; rebut the charges stated above (with supporting evidence); request an opportunity to review the government's evidence; admit deportability; designate the country to which you choose to be removed in the event that a final order of removal is issued (which designation the Department will honor only to the extent permitted under section 241of the Act, 8 U.S.C. 1231); and/or, if you fear persecution in any specific country or countries on account of race, religion, nationality, membership in a particular social group, or political opinion or, if you fear torture in any specific country or countries, you may request withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding/deferral of removal under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture). A grant of withholding or deferral of removal would prohibit your return to a country or countries where you would be persecuted or tortured, but would not prevent your removal to a safe third country.

You have the right to remain in the United States for 14 calendar days so that you may file a petition for review of this order to the appropriate U.S. Circuit Court of Appeals as provided for in section 242 of the Act, 8 U.S.C. 1252. You may waive your right to remain in the United States for this 14-day period. If you do not file a petition for review within this 14-day period, you will still be allowed to file a petition from outside of the United States so long as that petition is filed with the appropriate U.S. Circuit Court of Appeals within 30 calendar days of the date of your final order of removal.

[redacted] SDDO — Marlton NJ — 6/27/2011 10:00
(Signature and Title of Issuing Officer) (City and State of Issuance) (Date and Time)

Form I-851 (Rev. 08/01/07)

Certificate of Service

I served this Notice of Intent. I have determined that the person served with this document is the individual named on the other side of the form.

[redacted] SDDO 06/23/2011 Personal Service
(Signature and Title of Officer) (Date and Manner of Service)

☐ Explained and/or served this Notice of Intent to the alien in the Spanish language.

Jose Medina [redacted]
(Name of Interpreter) (Signature of Interpreter)

Location/Employer:

Acknowledgment that I Have Received this Notice of Intent to Issue a Final Administrative Removal Order.

Mario [redacted] 6/23/2011 0920
(Signature of Respondent) (Date and Time)

☐ The alien refused to acknowledge receipt of this document.

(Signature and Title of Officer) (Date and Time)

☐ **I Wish to Contest and/or to Request Withholding of Removal**

☐ I contest my deportability because: *(Attach any supporting documentation)*

- ☐ I am a citizen or national of the United States.
- ☐ I am a lawful permanent resident of the United States.
- ☐ I was not convicted of the criminal offense described in allegation number 6 above.
- ☐ I am attaching documents in support of my rebuttal and request for further review.

☐ I request withholding or deferral of removal to _____ [Name of Country or Countries]:

- ☐ Under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), because I fear persecution on account of my race, religion, nationality, membership in a particular social group, or political opinion in that country or those countries.
- ☐ Under the Convention Against Torture, because I fear torture in that country or those countries.

(Signature of Respondent) (Printed Name of Respondent) (Date and Time)

☑ **I Do Not Wish to Contest and/or to Request Withholding of Removal**

☑ I admit the allegations and charge in this Notice of Intent. I admit that I am deportable and acknowledge that I am not eligible for any form of relief from removal. I waive my right to rebut and contest the above charges. I do not wish to request withholding or deferral of removal. I wish to be removed to

El Salvador

☑ I understand that I have the right to remain in the United States for 14 calendar days in order to apply for judicial review. I do not wish this opportunity. I waive this right.

Mario [redacted] Mario Reyes 6/23/2011 0900
(Signature of Respondent) (Printed Name of Respondent) (Date and Time)

[redacted] TRUSHANT DARJI 6/23/2011 0900
(Signature of Witness) (Printed Name of Witness) (Date and Time)

RETURN THIS FORM TO:
Department Of Homeland Security

_____

_____

_____

ATTENTION: **The Department office at the above address must RECEIVE your response within 10 calendar days from the date of service of this Notice of Intent (13 calendar days if service is by mail).**

Form I-851 (Rev. 08/01/07)

App.023

Exhibit
C

U.S. Department of Homeland Security

Notice of Rights and Request for Disposition

Subject ID : [redacted] Event No: [redacted]
FINS #: [redacted] File No: [redacted]

Name: Mario REYES(AKA: REYES, MARIO)

NOTICE OF RIGHTS

You have been arrested because immigration officers believe that you are illegally in the United States. You have the right to a hearing before the Immigration Court to determine whether you may remain in the United States. If you request a hearing, you may be detained in custody or you may be released on bond, until your hearing date. In the alternative, you may request to return to your country as soon as possible, without a hearing.

You have the right to contact an attorney or other legal representative to represent you at your hearings, or to answer any questions regarding your legal rights in the United States. Upon your request, the officer who gave you this notice will provide you with a list of legal organizations that may represent you for free or for a small fee. You have the right to communicate with the consular or diplomatic officer from your country. You may use a telephone to call a lawyer, other legal representative, or consular officer at any time prior to your departure from the United States.

REQUEST FOR DISPOSITION

Initials ☒ I request a hearing before the Immigration Court to determine whether or not I may remain in the United States.

Initials ☐ I believe I face harm if I return to my country. My case will be referred to the Immigration Court for a hearing.

Initials ☒ I admit that I am in the United States illegally, and I believe that I do not face harm if I return to my country. I give up my right to a hearing before the Immigration Court. I wish to return to my country as soon as arrangements can be made to effect my departure. I understand that I may be held in detention until my departure.

Mario [redacted]
Signature of Subject

6-23-11
Date

CERTIFICATION OF SERVICE

☒ Notice read by subject.

☒ Notice read to subject by JOSE ALCOTA, in the SPANISH language.

T. DARTE, JR.
Name of Officer (Print)

JOSE ALCOTA, SIA
Name of Interpreter (Print)

[redacted]
Signature of Officer

6-23-11 9 PM
Date and Time of Service

Form I-826 (Rev. 08/01/07)

Exhibit
D

Notice of Intent to Issue a Final Administrative Removal Order

In removal proceedings under section 238(b) of the Immigration and Nationality Act

Event No: [redacted]
File Number [redacted]

To: Mario REYES AKA: REYES, MARIO

Address: CRAF STATE PRISON TRENTON MERCER NJ UNITED STATES
(Number, Street, City, State and ZIP Code)

Telephone:
(Area Code and Phone Number)

Pursuant to section 238(b) of the Immigration and Nationality Act (Act) as amended, 8 U.S.C. 1228(b), the Department of Homeland Security (Department) has determined that you are amenable to administrative removal proceedings. The determination is based on the following allegations:

1. You are not a citizen or national of the United States.
2. You are a native of EL SALVADOR and a citizen of EL SALVADOR
3. You entered the United States (at)(near) Unknown place on or about Unknown date
4. At that time you entered Unknown Place
5. You are not lawfully admitted for permanent residence.
6. You were, on December 11th, 2009, convicted in the New Jersey Superior Court Hudson County for the offense of Aggravated Assault in violation of N.J.S.A. 2C:12-1b(1) for which the term of imprisonment imposed was 3 years

Charge:
You are deportable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii), as amended, because you have been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act, 8 U.S.C. 1101(a)(43)(F).

Based upon section 238(b) of the Act, 8 U.S.C. 1228(b), the Department is serving upon you this NOTICE OF INTENT TO ISSUE A FINAL ADMINISTRATIVE REMOVAL ORDER ("Notice of Intent") without a hearing before an Immigration Judge.

Your Rights and Responsibilities:
You may be represented (at no expense to the United States government) by counsel, authorized to practice in this proceeding. If you wish legal advice and cannot afford it, you may contact legal counsel from the list of available free legal services provided to you.

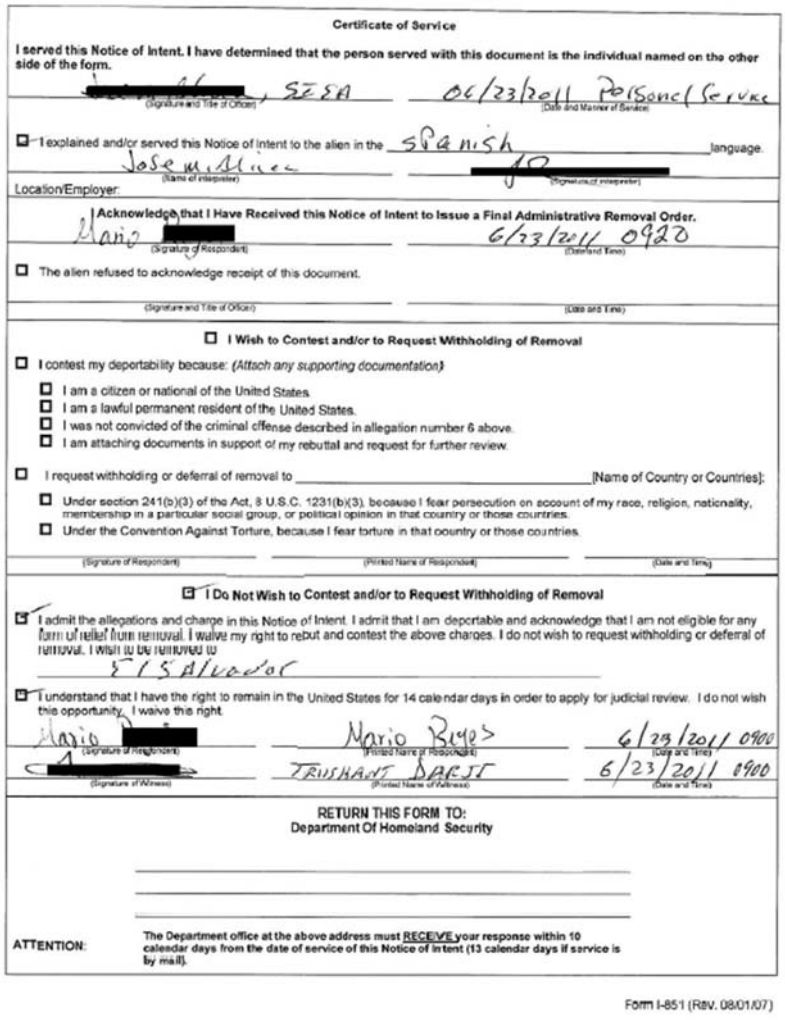
You must respond to the above charges in writing to the Department address provided on the other side of this form within 10 calendar days of service of this notice (or 13 calendar days if service is by mail). **The Department must RECEIVE your response within that time period.**

In your response you may: request, for good cause, an extension of time; rebut the charges stated above (with supporting evidence); request an opportunity to review the government's evidence; admit deportability; designate the country to which you choose to be removed in the event that a final order of removal is issued (which designation the Department will honor only to the extent permitted under section 241of the Act, 8 U.S.C. 1231); and/or, if you fear persecution in any specific country or countries on account of race, religion, nationality, membership in a particular social group, or political opinion or, if you fear torture in any specific country or countries, you may request withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding/deferral of removal under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture). A grant of withholding or deferral of removal would prohibit your return to a country or countries where you would be persecuted or tortured, but would not prevent your removal to a safe third country.

You have the right to remain in the United States for 14 calendar days so that you may file a petition for review of this order to the appropriate U.S. Circuit Court of Appeals as provided for in section 242 of the Act, 8 U.S.C. 1252. You may waive your right to remain in the United States for this 14-day period. If you do not file a petition for review within this 14-day period, you will still be allowed to file a petition from outside of the United States so long as that petition is filed with the appropriate U.S. Circuit Court of Appeals within 30 calendar days of the date of your final order of removal.

[redacted] | Martha NJ | 6/27/2011 10:40
(Signature and Title of Issuing Officer) | (City and State of Issuance) | (Date and Time)

Form I-851 (Rev. 08/01/07)



Certificate of Service

I served this Notice of Intent. I have determined that the person served with this document is the individual named on the other side of the form.

[redacted], SDDO — 06/23/2011 Personal Service
(Signature and Title of Officer) (Date and Manner of Service)

☐ I explained and/or served this Notice of Intent to the alien in the Spanish language.
Jose Millan [redacted]
(Name of interpreter) (Signature of interpreter)

Location/Employer:

Acknowledge that I Have Received this Notice of Intent to Issue a Final Administrative Removal Order.

Mario [redacted] — 6/23/2011 0920
(Signature of Respondent) (Date and Time)

☐ The alien refused to acknowledge receipt of this document.

(Signature and Title of Officer) (Date and Time)

☐ **I Wish to Contest and/or to Request Withholding of Removal**

☐ I contest my deportability because: *(Attach any supporting documentation)*

- ☐ I am a citizen or national of the United States.
- ☐ I am a lawful permanent resident of the United States.
- ☐ I was not convicted of the criminal offense described in allegation number 6 above.
- ☐ I am attaching documents in support of my rebuttal and request for further review.

☐ I request withholding or deferral of removal to _____ [Name of Country or Countries]:

- ☐ Under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), because I fear persecution on account of my race, religion, nationality, membership in a particular social group, or political opinion in that country or those countries.
- ☐ Under the Convention Against Torture, because I fear torture in that country or those countries.

(Signature of Respondent) (Printed Name of Respondent) (Date and Time)

☑ **I Do Not Wish to Contest and/or to Request Withholding of Removal**

☑ I admit the allegations and charge in this Notice of Intent. I admit that I am deportable and acknowledge that I am not eligible for any form of relief from removal. I waive my right to rebut and contest the above charges. I do not wish to request withholding or deferral of removal. I wish to be removed to El Salvador

☑ I understand that I have the right to remain in the United States for 14 calendar days in order to apply for judicial review. I do not wish this opportunity. I waive this right.

Mario [redacted] — Mario Reyes — 6/23/2011 0900
(Signature of Respondent) (Printed Name of Respondent) (Date and Time)

[redacted] — TRISHANT SARJI — 6/23/2011 0900
(Signature of Witness) (Printed Name of Witness) (Date and Time)

RETURN THIS FORM TO:
Department Of Homeland Security

_____
_____
_____

ATTENTION: **The Department office at the above address must RECEIVE your response within 10 calendar days from the date of service of this Notice of Intent (13 calendar days if service is by mail).**

Form I-851 (Rev. 08/01/07)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
v.	)	
MARIO NELSON REYES-ROMERO,	)	2:17-cr-292
Defendant.	)	

OPINION

Mark R. Hornak, United States District Judge.

The Defendant Mario Nelson Reyes-Romero ("Defendant") was administratively removed from the United States in 2011, and he was discovered back in the United States in 2017 without permission from the necessary officials of the federal government, resulting in his indictment for one count of Reentry of Removed Alien, 8 U.S.C. § 1326. (Indictment, ECF No. 1.) Three motions are now pending in this criminal case before the Court.

First, the Defendant seeks dismissal of the Indictment, claiming that the Removal of the Defendant in 2011 was contrary to law. The Defendant's Motion to Dismiss Indictment, ECF No. 14, asserts that the Defendant fulfills all of the elements of the affirmative defense set out in § 1326(d) as a matter of law. The Court agrees, and for the reasons set forth at length in this Opinion, the Court grants the Defendant's Motion to Dismiss Indictment.

In so ruling, the Court reaches no conclusion as to whether the Defendant can, should, or will now be removed from the United States in a manner consistent with federal law. But the Court does conclude that the process used to remove him in 2011 was contrary to law and that the Defendant has successfully challenged the 2011 Removal Order under § 1326(d), thus rendering it invalid.

Second, the Defendant's Motion for Bond, ECF No. 36, requests that the Defendant be released on bond subject to reasonable conditions. The Motion for Bond is moot in light of the Court's granting of the Defendant's Motion to Dismiss Indictment.

Third, the Government's Motion to Dismiss Indictment, ECF No. 46, requests that the Court dismiss this case with prejudice without reaching the merits of Defendant's Motion to Dismiss. For the reasons set out at length below, the Government's Motion to Dismiss Indictment, ECF No. 46, is denied.

I. Factual Background

According to the Government, the Defendant, a citizen of El Salvador, entered the United States unlawfully at some point prior to November 2008. (Gov't's Br. in Opp'n, ECF No. 17, at 3.) In 2009, he was convicted in New Jersey state court for the state law crime of second degree aggravated assault.[1] (*Id.*) In 2011, the Department of Homeland Security (DHS) commenced an administrative removal proceeding ("2011 Removal Proceeding") against the Defendant pursuant to 8 U.S.C. § 1228, which authorizes the expedited removal of aliens convicted of "aggravated

[1] In violation of N.J. Stat. Ann. 2C:12-1b(1) (2009).

felonies" as that term is defined under federal law. (*Id.*)

As part of that 2011 Removal Proceeding, the Defendant completed and signed two DHS forms: DHS Form I-826 and DHS Form I-851 (the "Forms"), which are described in detail below. A Final Administrative Removal Order was served on the Defendant on June 23, 2011. (App. to Br. in Supp. of Def.'s Mot. to Dismiss ("Def.'s App.") 21, ECF No. 16 ("2011 Removal Order").) The Defendant was deported and removed to El Salvador in August 2011. (Def.'s App. 11.) The Government alleges that the Defendant was discovered in the Western District of Pennsylvania on October 3, 2017, but he had allegedly not gone through any administrative or judicial channels to obtain lawful re-admittance to the United States. (ECF No. 17, at 5–6.)

On October 24, 2017, the Defendant was indicted in this District on one (1) count of Reentry of Removed Alien, 8 U.S.C. § 1326. (ECF No. 1.) The Defendant filed his Motion to Dismiss Indictment on November 17, 2017. (ECF No. 14.) The Court held hearings on January 3 and 4, 2018, and the Court authorized supplemental briefing. (ECF Nos. 23, 26, 27.) Due to the time it took for the Government to produce various immigration files, the deadlines for those supplemental briefs were extended considerably. (*See* ECF Nos. 28, 32, 34, 38, 51.) Meanwhile, on February 15, 2018, the Defendant filed his Motion for Bond, and on February 27, 2018, the Government filed its own Motion to Dismiss Indictment. (ECF Nos. 36, 46.) The Court held further hearings on March 1, 2, and 22, 2018. (ECF Nos. 53, 54, 73.) All supplemental briefs

have been submitted, and all three Motions are ripe for decision.

II. Defendant's Motion to Dismiss

The Defendant brings his Motion to Dismiss asserting the affirmative defense to the charge of reentry of removed alien, as set out in 8 U.S.C. § 1326(d). That provision provides an opportunity for the Defendant to collaterally attack the underlying removal order (here, the 2011 Removal Order), which, if successful, defeats a necessary element of the reentry of removed alien offense and requires dismissal of the Indictment. The Defendant argues that his removal from the United States pursuant to the 2011 Removal Order cannot function as a basis for a § 1326 prosecution now because the 2011 Removal Order was premised on illegitimate and ineffective waivers of his rights contained in the two involved Forms (I-826 and I-851). (Def.'s Br. in Supp., ECF No. 15.)

A. Legal Framework

"The Fifth Amendment guarantees aliens due process in all phases of deportation proceedings." *Bonilla v. Sessions*, 891 F.3d 87, 91 (3d Cir. 2018). "Fundamental precepts of due process provide an alien subject to illegal re-entry prosecution under 8 U.S.C. § 1326 with the opportunity to challenge the underlying removal order under certain circumstances." *United States v. Charleswell*, 456 F.3d 347, 351 (3d Cir. 2006). Where the underlying removal proceeding "is so procedurally flawed that it 'effectively eliminated the right of the alien to obtain judicial review,' we may invalidate the criminal charges stemming therefrom." *Id.* at 352 (quoting

United States v. Mendoza-Lopez, 481 U.S. 828, 839 (1987)). A defendant charged with reentry of removed alien under § 1326 may collaterally attack the underlying removal order if the defendant establishes that:

> (1) the defendant exhausted any administrative remedies that may have been available;
>
> (2) the deportation proceedings from which the underlying removal order was issued improperly deprived the alien of the opportunity to obtain judicial review; and
>
> (3) the entry of the removal order was "fundamentally unfair."

8 U.S.C. § 1326(d); *Charleswell*, 456 F.3d at 351.

If the collateral attack on the underlying removal order is premised on an alleged invalid waiver of rights associated with a deportation proceeding, the Government has the initial burden to produce the written waiver signed by the defendant. *Richardson v. United States*, 558 F.3d 216, 222 (3d Cir. 2009). The burden then shifts to the Defendant to show by a preponderance of the evidence that the waiver is invalid. *Id.* at 219, 222 n.5. A waiver is invalid if it is not entered into voluntarily and intelligently. *Id.* at 219–20. If the waiver is found to be invalid, the Defendant is excused from showing an exhaustion of administrative remedies. *Id.* at 220 (quoting *United States v. Muro-Inclan*, 249 F.3d 1180, 1183 (9th Cir. 2001), for the conclusion that § 1326(d)'s exhaustion requirement "cannot bar collateral review of a deportation proceeding when the waiver of right to an administrative appeal did not comport with due process").

Along the same lines, an invalid waiver of the opportunity for judicial review constitutes a deprivation of judicial review, and, in such a case, the Defendant will also be deemed to meet the second element. *Mendoza-Lopez*, 481 U.S. at 840 (when a waiver of rights related to one's right to judicial review is not entered into intelligently, there is a deprivation of the opportunity for judicial review).

In order to meet the third element, a showing that the underlying removal proceeding was "fundamentally unfair," the Defendant must establish both (a) that some fundamental error occurred and (b) that as a result of that fundamental error, the defendant suffered prejudice. A fundamental error may take the form of a proceeding that "deprives an alien of some substantive liberty or property right such that due process is violated," *Charleswell*, 456 F.3d at 359, or "where an agency has violated procedural protections such that the proceeding is rendered fundamentally unfair." *Id.* at 360. Resulting prejudice requires the Defendant to establish (by a preponderance of the evidence) a reasonable likelihood that the result would have been different if the fundamental error in the removal proceeding had not occurred.[2] *Id.* at 361. Our Court of Appeals has noted that the answer to whether there was prejudice requires the district court to determine whether there is a "reasonable probability" that the Defendant

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[2] This is a higher standard than the "plausible ground for relief from deportation" standard used in the Ninth Circuit. *Charleswell*, 456 F.3d at 361. Our Court of Appeals reiterated that the "reasonable likelihood" standard is "analogous to the standard required of a defendant to prove an ineffective assistance of counsel claim." *Id.*

"would have obtained relief had he not been denied the opportunity for direct judicial review of his [removal] order." *Id.* at 362. However, the *Charleswell* Court also noted that "some procedural defects may be so central or core to a proceeding's legitimacy, that to require an alien to establish even a 'reasonable likelihood' that he would have obtained a different result establishes too high a burden." *Id.* at 362 n.17.

B. Discussion

Whether the purported waivers within the Forms are valid impacts this Court's analysis of the first two § 1326(d) elements. Thus, the Court begins its discussion with an analysis of the purported waivers, initially describing both what the Forms themselves show and what the DHS Officers who completed the Forms with the Defendant testified to about them. The Court finds and concludes that the purported waivers in the Forms are invalid both facially and as explained by the Government's witnesses. With this, the Court concludes that the first two elements of the § 1326(d) affirmative defense have been met. Then, the Court analyzes the third element, addressing both fundamental error and prejudice. The Court finds and concludes that the entry of the 2011 Removal Order was the result of "fundamental error" and caused actual prejudice to the Defendant. And beyond that, due to the egregious nature of the fundamental error, the Court also finds and concludes that the 2011 Removal Order was inherently and presumptively prejudicial to the Defendant.

Thus, the Court concludes that the Defendant has met his burden to show that all of the elements of his § 1326(d) affirmative defense are met, and the

Defendant's Motion to Dismiss the Indictment is granted.

1. The Purported Waivers

Third Circuit law as stated in *Richardson* and Supreme Court precedent as discussed in *Mendoza-Lopez* say that an alien validly waives his rights associated with a removal proceeding only if he does so voluntarily and intelligently. The "waivers" at issue here are located within the two Forms that were presented to the Defendant during his 2011 Removal Proceeding, at the same time, 9:00 AM on June 23, 2011. "In cases where there is a written waiver, this issue frequently comes down to an issue of credibility." *United States v. Meza-Magallon*, No. 17-cr-379, 2017 U.S. Dist. LEXIS 190970, at *14 (E.D. Pa. Nov. 16, 2017). Credibility certainly plays a large role in this case, but what the Forms show on their face is itself rather astounding. The Court first summarizes what the Forms themselves demonstrate. Then, the Court provides an account of what the Government's witnesses testified to with respect to the Forms. Finally, the Court makes its findings and conclusions that the Forms do not evidence valid waivers.

i. Form I-826

The first Form at issue here, the I-826, is titled, "Notice of Rights and Request for Disposition." (Def.'s App. 106; Ex. H, ECF No. 63-1 (color copy).) The color copy is attached to this Opinion as Exhibit A.[3] The top of the first page of the I-826 reads:

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[3] The Court has partially redacted the DHS Officers' signatures from the copies of the Forms appended to this Opinion because the publication of complete signatures could pose an identity theft issue to those involved. The appearance of those signatures

> You have been arrested because immigration officers believe that you are illegally in the United States. **You have the right to a hearing before the Immigration Court to determine whether you may remain in the United States.** If you request a hearing, you may be detained in custody or you may be eligible to be released on bond, until your hearing date. In the alternative, you may request to return to your country as soon as possible, without a hearing.

(*Id.* (emphasis added).) After the remainder of its "Notice of Rights" section, there is a section entitled, "Request for Disposition." There are three options from which the subject (here, the Defendant) may select and initial:

____ o I request a hearing before the Immigration Court to determine whether or not I may remain in the United States.

____ o I believe I face harm if I return to my country. My case will be referred to the Immigration Court for a hearing.

____ o I admit that I am in the United States illegally, and I believe that I do not face harm if I return to my country. I give up my right to a hearing before the Immigration Court. I wish to return to my country as soon as arrangements can be made to effect my

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is not germane to the issues here. The Court has also redacted other non-germane identifying information on the copies of the Forms, including addresses and DHS internal identification numbers. The Defendant's signature is partially redacted as to his surname, but otherwise provided because its appearance is germane to the issues before the Court, as set out below.

> departure. I understand that I may be held in detention until my departure.

(*Id.*) On the Defendant's completed I-826, two boxes are marked with an "X": the first box, indicating a request for a hearing, and the third box, waiving his right to a hearing. None of the boxes are initialed. What is more striking than those plainly contradictory choices is the manner in which these boxes were selected. The first selected option, requesting a hearing, is marked with a large bold X in black ink, appearing as if the X was reinforced with an additional black X over it. The other selected option, waiving the "right to a hearing," contains a small thin black X as well as a light blue slash (or what may better be described as half of an X). The Defendant's signature under the selections appears in black ink. The signature by DHS Deportation Officer Trushant Darji in the third and final section of the I-826, entitled "Certification of Service," appears in light blue ink identical in appearance to the marking on the selected option of "no hearing." Under "Date and Time of Service," markings indicating June 23, 2011, and 9:00 also appear in that same light blue ink. (*Id.*) Notably, the I-826 reflects that the Defendant had the I-826 read to him in Spanish, but also that the Defendant read it himself in English, a language he does not speak. (ECF No. 16, at 106.)

ii. Form I-851

The second Form at issue here, the I-851, is a two-page document titled, "Notice of Intent to Issue a Final Administrative Removal Order." (Def.'s App. 22–23; Ex. J, ECF No. 63-3 (color copy).) It is attached to this

Opinion as Exhibit B.[4] The first page contains information about the Defendant with a charge indicating that the Defendant is "deportable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii), as amended, because you have been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act, 8 U.S.C. 1101(a)(43)(F)." (Def.'s App. 22.) The Charge informs the individual that DHS is serving such notice "without a hearing before an Immigration Judge." (*Id.*)

Below that is a section called "Your Rights and Responsibilities," and it indicates that the alien (here, the Defendant) may request withholding of removal under 8 U.S.C. § 1231(b)(3) if he fears persecution in any specific country and that the Defendant may rebut the charges stated on the Form. At the bottom of the first page of the I-851, there is a signature line for "Signature and Title of Issuing Officer." That line contains a signature by the "Issuing Officer" and bears a date and time notation of June 23, 2011, at 10:00. (*Id.*)

The first section at the top of the second page of the I-851 is the "Certificate of Service." (Def.'s App. 23.) Below the signature of the serving officer indicating the Notice of Intent was served (Officer Jose Alicea) is a *checked* box that states "I explained and/or served this Notice of Intent to the alien in the Spanish language." The name of the interpreter, also Jose Alicea, is printed, followed by his signature. Immediately below that line is an acknowledgement of receipt with the Defendant's signature and a date and time notation of June 23, 2011, 9:20 (presumably,

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[4] *See supra* note 3.

A.M.). (*Id.*) Thus, the plain reading of this Form is that it was signed by the Issuing Officer and "issued" forty (40) minutes after receipt was purportedly acknowledged by the Defendant at 9:20 AM that day.

The middle section of the second page of the I-851 provides options for contesting removal or seeking withholding of removal, and it is left blank. (*Id.*)

The final section of the second page of the I-851 has three boxes also *checked.* The first corresponds with the selection, "I do not wish to contest and/or to request withholding of removal." The second *checked* box corresponds with the selection admitting the allegations and charges contained in the form, acknowledging ineligibility for any form of relief from removal, and expressing a wish to be removed to El Salvador. The third *checked* box corresponds with the selection "I understand that I have the right to remain in the United States for 14 calendar days in order to apply for judicial review. I do not wish this opportunity. I waive this right." (*Id.*) The Defendant then signed the corresponding signature block, with a date and time of June 23, 2011, 9:00 written in that section. It is "witnessed" by the interpreter and DHS serving officer, Jose Alicea, with the very same date and time notation. (*Id.*)

Thus, based on the time notations on the face of the I-851 alone,[5] the Defendant supposedly waived his rights to contest removal or apply for judicial review twenty (20) minutes *before* he acknowledged receipt of the Form I-851 and an hour before it was ever "issued."

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[5] Officer Alicea testified that all times on both Forms were taken from the very same clock in the DHS office. (ECF No. 30, 89:13–17.)

(Def.'s App. 22–23.) When read in conjunction with the I-826, the Defendant supposedly waived all his rights (including to judicial review) on the I-851 at the exact moment that he was served with the I-826, where he had affirmatively indicated his request for a hearing.

Importantly, a *check mark* was used by Officer Alicea when he signed the "Certificate of Service" section at the top of the I-851's second page, and *check marks* also appear in the "I do not wish to contest" portion at the bottom of that page, even though all of the markings on the boxes of the I-826, those next to Defendant's signature and those next to Officer Darji's signature, were "X" marks. Thus, while different notations were made in the selection boxes as between the I-826 and the I-851, the markings in each case attributed to the Defendant switched from Form to Form yet matched the markings attributed to the Officers on each such Form.[6]

iii. The Government Witnesses' Testimony

In an effort to explain the Forms and place them into the context of the 2011 Removal Proceeding, the Government called two witnesses, both of whom were the DHS Officers whose names and signatures appear on the Forms: Officers Trushant Darji and Jose

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[6] Officer Darji testified that the Defendant "held the pen" when the Forms were completed. (ECF No. 30, 22:1–8.) Based on its examination of the color copies of the Forms, the ink colors of the various signatures, the switching between check marks and "X" marks, and the fluid nature of the Officers' testimony, the Court harbors substantial doubt that the Defendant personally made the critical notations.

Alicea. Based on the Court's consideration of all the evidence before it, its own examination of the witnesses, and its personal observations relative to that testimony in open Court, the Court finds and concludes that this testimony was, at key points, internally inconsistent, contradictory in comparison with the content of the Forms, and simply nonsensical. The Court stated just that at several points during the various hearings in this case, and the Government has not contradicted those tentative conclusions. (*See*, *e.g.*, ECF No. 31, 51:9–54:20; ECF No. 57,11:1–11 & 47:4–48:1; ECF No. 58, 14:17–17:1; ECF No. 77, 22:18–26:5.) The Court also made tentative findings during the hearings that certain material portions of the Officers' testimony were false.[7] To explain these conclusions, the Court recounts the following excerpts from the evidentiary hearings.[8]

Officer Trushant Darji testified that Form I-826 is served in every removal case to ensure that the presiding DHS officer has an understanding of the alien's intentions and to provide the alien with notice of certain rights. (Tr. of Proceedings, ECF No. 30, 25:20–30:23.) He testified that DHS officers would advise the alien what the Form was, read everything

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[7] *See, e.g.*, ECF No. 77, 22:21–25 ("[T]he Court is more convinced than ever that the testimony that was offered at the first hearing by the two ICE agents under oath were a combination of nonsense . . . and material portions of the balance of it were lies."); *id.* at 25:5–10.

[8] As detailed below, the Government has informed this Court that is does not rely on or adopt the testimony of the Officers that it called to the stand at the first hearing as to these matters. (Gov't's Resp. Br. in Supp. of Gov't's Mot. to Dismiss, ECF No. 66, at 7.)

on the Form to the alien, and explain all of the options for the alien to select from. If the alien selects multiple options as to requesting a hearing or asking for no hearing, a DHS officer would "absolutely" attempt to clarify the alien's desires before other forms were filled out, including by having the alien initial his "real" choice. (*Id.* at 29:10–14.) It is plain that this "standard" process was not followed here, and that the Officers elected to go forward with the notation that the Defendant did not want a hearing, even though they offered no basis to exclude the equally chosen and marked choice that he did seek a hearing. (ECF No. 30, 61:11–62:14 & 72:14–18.) Officer Darji then testified that both Forms would be served together at the same time upon the detainee. (ECF No. 30, 32:12–15.) He later changed his testimony to say that he normally serves the "rights form" (the I-826) first. (ECF No. 30, 33:15–17.) When confronted with the time notations on the Defendant's I-826 and his I-851, Officer Darji acknowledged that it appeared as if all the waivers (and the alleged explanations that would have come along with providing those Forms) happened simultaneously, that is, literally at the same moment in time. (ECF No. 30, 62:2–11.)

Discerning the purpose of the first-page "issuing" signature on the I-851, or where and exactly when the I-851 indicates it was authorized to be served on the detainee, was obfuscated by Officer Darji's convoluted testimony. He first testified that in his general practice (because he had no specific recollection of this particular removal proceeding),[9] charging documents

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[9] The Government nonetheless proffered both Officers to testify as to their interpretation of the Forms based on their experience

in a removal proceeding would be "signed off' by the DHS officer's supervisor, then signed off by agency attorneys and more supervisors, and then and only then the documents would be served upon the detainee. (ECF No. 30, 20:17–23 & 22:24–23:3.) However, in an attempt to explain why this I-851 shows service (and waivers of rights) signatures occurring *before* the issuing signature of a DHS supervisor, Officer Darji testified that it was not unusual to complete the "issuing signature" on the face of the I-851 *after* service on the alien because the issuing supervisor "wants to make sure we serve the documents on [the detainee, and] there are no problems with the notice of intent to issue the final order," implying that the "issuing" by a DHS supervising officer actually occurs after the Defendant signed an "un-issued" charging form. (ECF No. 30, 38:2–4.) Immediately thereafter, Officer Darji instead stated that the issuing signature "authorize[s] you to approach the alien with this document." (ECF No. 30, 38:5–7.)

But later, perhaps recognizing that such "issuing" authorization was signed at least forty (40) minutes after presentation of the I-851 to the Defendant, Officer Darji changed his testimony again to say that the "issuing signature's" purpose was to show "that the document was served on the alien," even though the I-851 itself says no such thing on its first page and there is a separate section for certification of service on its second page. (ECF No. 30, 40:6–9.) After a short recess and on re-direct, Officer Darji reversed course

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generally with such Forms and/or as lay opinion witnesses. (Tr. of Proceedings, ECF No. 30, 42:3–17.)

again and said that it *actually* was standard practice to complete the "issuing signature" on the first page *after* the document had been served. (ECF No. 30, 64:6–16.) When the Court asked the Officer why he initially gave opposite answers, Officer Darji responded that "[t]hinking about it after I answered the first time, the second answer was more appropriate." (ECF No. 30, 73:12–15.) This response required the Court to follow-up with, "[w]hich answer was true?" To which the Officer responded that the Form would be "signed by the supervisor after we serve them." (*Id.* at 73:19–21.) In terms of this Officer's explanation of the I-851 in this case, the Court finds and concludes that his testimony was at odds with the text and facially stated purposes of the various provisions of the I-851.

Based on the Court's consideration of all of the testimony presented and its observations of his demeanor on the witness stand, his testimony in those regards was false, likely given in an effort to explain away the reality that the Defendant was confronted with and induced to sign the I-851 before it was even "issued" or, as demonstrated below, fully explained to him.

Officer Darji testified that an I-851 would be presented to the detainee and an Officer would go through the first page, top to bottom, and then the second page, top to bottom, explaining everything. (ECF No. 30, 33:23–35:5.) The certificate of service would be completed at the top of the second page, and then the alien would check off what option he wanted, e.g., to contest or not contest removal. (*Id.*) Despite that standard operating procedure, Officer Darji immediately followed that explanation with testimony

that it was not unusual for the detainee to waive his rights before the certificate of service was signed "[b]ecause basically the form was signed by the alien down below after he is explained everything, *then* the administrative order was actually served and acknowledged and *explained to him by the native speaker* . . . ." (ECF No. 30, 36:16–23 (emphasis added).) When asked what occurred in the time *after* the detainee actually waived his rights and before the certificate of service is completed, Officer Darji testified that "we would make sure the alien understood everything." (ECF No. 30, 37:3–5.) This, of course, would facially obviate any waiver, as it would have been "made" *before* the required explanation and confirmation of understanding.

The Government's next witness, Officer Jose Alicea, testified that when serving multiple forms, the Officer would serve one Form and then go on to the next Form upon completing the service of the first one. When the Court asked why an Officer would list the same time on the Forms for multiple serial events, Officer Alicea responded that the respective time notations are based on whatever the clock in the room read when it was time to sign. (ECF No. 30, 88:24–89:17.)

When Officer Alicea was asked why his signature on the I-851 was time-noted twenty (20) minutes after the Defendant signed the waiver, he testified that the time gap "would have been about the time my explanation was completed." (ECF No. 30, 91:5–8.) In response to a question from the prosecution, Officer Alicea confirmed that those twenty (20) minutes after the purported waiving of rights were used to "read the document in Spanish to the alien." (ECF No. 30, 91:9–12.) This of course means that the Defendant

supposedly waived his rights by his signature before they were read to him in Spanish.[10] Immediately thereafter, perhaps sensing the impact of his prior (and then re-confirmed) contrary testimony, Officer Alicea switched gears and testified that he would have read the document to the alien in Spanish *before* the alien made any selection on the I-851. (ECF No. 30, 91:13–15.) The Court concludes that given the times on the Forms, the balance of their content, the overall tenor and content of Officer Alicea's testimony, and his demeanor on the witness stand as observed by the Court, this later statement was false, likely presented by Officer Alicea in an effort to explain away his prior testimony.

Officer Alicea also testified on direct examination that administrative removal proceedings in New Jersey were something that he was commonly involved in (ECF No. 30, 82:7–11), and he did not have a specific recollection of serving the specific Forms at issue in this case. (ECF No. 30, 85:17–19.) Then, in that same direct examination, Officer Alicea also testified that administrative Removal Proceedings were rare in New Jersey, and this specific Removal Proceeding with the Defendant was the only administrative removal proceeding that he could recall being involved with at the New Jersey office. (ECF No. 30, 91:20–92:17.) When the Court asked him about this contradiction, Officer Alicea testified the Defendant's I-851 was the only I-851 he could recall doing. (ECF No. 30, 92:18–24.)

Now that the Court has summarized the content of the Forms and the testimony of the DHS Officers who

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[10] Both Forms are printed only in English.

signed and served those Forms on the Defendant, the Court analyzes the effect of these Forms and that testimony on the issue of waiver.

iv. The Waivers Are Invalid

The Court concludes that the waivers in the Forms, both in the I-826 and I-851, are facially invalid. The Government has not met its initial burden to produce a facially valid written waiver signed by the Defendant. This I-826 is internally and inherently contradictory on its face. It is impossible to discern whether the Defendant actually waived his rights (including to a hearing), because the Defendant's signature corresponds to a selection both waiving and *not* waiving his rights to a hearing, a hearing the I-826 affirmatively said that he could request. Therefore, the Court cannot conclude that the I-826 presented by the Government is actually what the Government asserts it to be: a waiver.

At one point, the Government posited that the I-826 was actually irrelevant to the case and should be disregarded because the I-851 was the controlling document:

> THE COURT: You are saying the agents of the United States Department of Homeland Security required this defendant and everyone else to go over and to sign a legally pointless document, the 826?
>
> MR. HALLOWELL: That's my understanding of [the Officers'] testimony, Your Honor.

(Tr. of Proceedings, ECF No. 31, 17–22.) Even if that is the actual relationship between the I-851 and the I-826, the Court has to take the case as it is, and the Defendant was given both Forms at the same time, one

of which told him he had a right to a hearing. This reason alone shows that any sense of what the Defendant's hearing rights and other rights actually were had become practically indecipherable, and waivers stemming from such transaction could not have been entered into intelligently. As our Court of Appeals acknowledged in *Charleswell*:

> The presence of an affirmative statement concerning an avenue of relief [ ] immediately followed by a negative command concerning what the alien may not do, creates the impression that "these are the options." Absent any affirmative notice to the contrary, and combined with the velocity of the [immigration] process, it is simply unrealistic to expect an alien to recognize, understand and pursue his statutory right [under applicable laws] to direct judicial review in the appropriate court of appeals.

Charleswell, 456 F.3d at 357.

The I-851 also suffers from facial defects preventing it from constituting an actual written waiver. The Defendant signed the "waiver" section before it was entirely explained to him in his native language, he signed the waiver section before it was served on him, and it was served on him before it was issued. In short, he supposedly signed away his rights before he was charged and before those rights were read to him in Spanish. The waivers are facially invalid.

But there is more. Even if the Government had met its burden by merely producing a piece of paper *purporting* to be a waiver and containing the Defendant's signature, the Defendant has met his burden to show by a preponderance of the evidence

that the waivers are invalid, because it is plain that the waivers were not entered into voluntarily or intelligently. Viewed independently, both Forms facially show either an unintelligent or an involuntary waiver of rights, or in the case of the wholly contradictory statements on the I-826 as to requesting a hearing, no waiver at all. When the Forms themselves are considered in conjunction with the testimony of the DHS Officers, the Court finds and concludes that the option giving up the right to a hearing on the I-826, given that this "selection" was partially made with the same ink color that the DHS Officer used to sign the form, was not made voluntarily or likely even made by the Defendant.[11] The fact that

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[11] The record also includes a two sets of documents, each titled "Record of Sworn Statement in Affidavit Form," supposedly made and signed by the Defendant. With these documents, the Government attempts to show inconsistencies as to the Defendant's asserted fear of persecution. (Gov't's Resp. in Opp'n, ECF No. 17, at 13 n.7.) The first page is left blank with respect to the Defendant acknowledging receipt or being informed of the nature of the document. (Def.'s App. 116.) It is left blank as to what language was used with the Defendant or whether there was an interpreter. (*Id.*) The "Initials of the Subject" change throughout the document, yet none match the name of the Defendant. (*Id.* at 116, 117, 119.) The signature of the "alien" on the last page does not match the Defendant's name or signature on other Forms. (*Id.*) The initials at the bottom of the first page corresponding to the agent of U.S. Immigration & Customs Enforcement do not appear to match the initials used on the top of that page designating the agent or the signature of the agent on the last page. (*Id.* at 116, 119.) The witness signature on the last page is left blank. (*Id.* at 119.) The second "Record of Sworn Statement" is of the same ilk. (Def.'s App. 124–28.) The name of the person giving the "sworn statement" is left blank. (*Id.* at 124.) Despite the document indicating it was made before a specified Agent in the Spanish language, the name of the interpreter is

both options on the I-826 were selected demonstrates that the Defendant did not intelligently (or actually) waive any rights that were described to him through the I-826. The order in which the sections of the I-851 were completed and the manner in which those sections were purportedly completed (based on the portions of testimony that the Court believed to be credible) demonstrates that any waivers in the I-851 were made unintelligently, as the Defendant purportedly waived his rights before the I-851 was fully explained to him *or* served on him.

These conclusions are further corroborated when the time notations on the Forms are read in conjunction with one another, showing the impossibility that the Forms were properly served, explained and translated, and then completed in accordance with all of the time notations. Finally, the very nature of the contradictory explanation of rights on the separate Forms supports the determination

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blank. (*Id.*) The line for the Defendant to write in his own name indicating acknowledgement of receipt is left blank. (*Id.*) While the initials at the bottom of each page bear the letters "MR," the handwriting that appears on these documents bears no resemblance to the handwriting attributed to the Defendant on the Forms. (*Id.*) The "signature of alien" on the last page says "Mario Reyes" but also carries starkly different penmanship from the signatures attributed to the Defendant on the Forms. (*Id.* at 128.) *See United States v. Clifford*, 704 F.2d 86, 90 n.5 (3d Cir. 1983) (The fact finder "can compare a known handwriting sample with another sample to determine if the handwriting in the latter sample is genuine") (citing Fed. R. Evid. 901(b)(3)). This last page, bearing the signature, is attached to this Opinion as Exhibit C. In the Court's estimation, these documents cast further, substantial doubt on the validity of the Forms and their completion.

that the waivers were not entered into voluntarily and intelligently. *Mendoza-Lopez*, 481 U.S. at 840; *Charleswell*, 456 F.3d at 357.[12]

These two Forms are shams,[13] and the result of the involved Officers electing to run roughshod over not only what they testified were the standard and required DHS procedures, but also over any semblance of due process. To be sure, these assessments are blunt and direct, but in the Court's estimation are

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[12] The Government has not conceded that the Forms were completed and executed improperly, nor that the Forms facially demonstrate that the Defendant never actually and knowingly waived his right to a hearing. Rather, it takes the position that it will cease offering evidence or argument on that matter and put all of its chips on the prejudice marker. As the Court previously noted on the record in open court, the Court does not believe or conclude that the Government knowingly presented false testimony from the Officers when those Officers testified, and it in fact attempted (unsuccessfully) to rehabilitate their testimony while they were on the stand. But, as the Court explains below, the Government also does not have the luxury of taking a position of ambivalence as to the testimony it presents from federal agents. *See infra* pp.60–61 (discussing *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974)).

[13] The Government has not offered any explanation of the Officers' testimony and/or the Forms that would generate a benign interpretation of their contents or the Officers' testimony. The Government *has* stated that both the witnesses and the U.S. Attorney's Office had not inspected the originals (or color copies) of the Forms prior to the January 3, 2018, hearing. (Gov't's Resp. Br. in Supp. of Gov't's Mot. to Dismiss, ECF No. 66, at 3.) Indeed, the Court was unaware of the existence of the color copies until they were filed on the docket on March 14, 2018. (ECF No. 63.) Regardless, the blue versus black ink differences as seen on the color copies are only one slice of the pie, and serve to affirm the inconsistencies and contradictions already evident in the prior hearings.

compelled by the record. The Forms, and the 2011 Removal reliant on them, are invalid and the Officers' testimony proves it.

2. Exhaustion

The Defendant is excused from showing that he exhausted his administrative remedies in light of the invalid waivers. *Richardson*, 558 F.3d at 220 (quoting *Muro-Inclan*, 249 F.3d at 1183, for the conclusion that § 1326(d)'s exhaustion requirement "cannot bar collateral review of a deportation proceeding when the waiver of right to an administrative appeal did not comport with due process"); *see also United States v. Sosa*, 387 F.3d 131, 136 (2d Cir. 2004) ("[T]he exhaustion requirement must be excused where an alien's failure to exhaust results from an invalid waiver of the right to an administrative appeal."). Accordingly, the first *Charleswell* element (§ 1326(d)(1)) is satisfied.

3. No Opportunity for Judicial Review

By his establishing that the waivers for judicial review were invalid, the Defendant has shown that he has been deprived of judicial review. *Mendoza-Lopez*, 481 U.S. at 840 ("Because the waivers of their rights to appeal were not considered or intelligent, respondents were deprived of judicial review of their deportation proceeding. The Government may not, therefore, rely on those orders as reliable proof of an element of a criminal offense."). The second *Charleswell* element (§ 1326(d)(2)) is satisfied.

4. Fundamental Unfairness

Even though Defendant has met the first two elements, to prevail on his Motion to Dismiss, the Defendant must also show that the underlying

removal proceeding was "fundamentally unfair." This last element has two sub-parts. First, the Defendant must establish that some fundamental error occurred. Second, the Defendant must show that as a result of that fundamental error he suffered prejudice. To show prejudice, the Defendant must show based on a preponderance of the evidence that there is a "reasonable probability"[14] that the Defendant "would have obtained relief had he not been denied the opportunity for direct judicial review of his [removal] order." *Charleswell*, 456 F.3d at 362. The Defendant is able to meet both such prongs and therefore satisfies the third element.

i. Fundamental Error Occurred[15]

As set out above, the Forms that were intended to lay out the Defendant's rights and his elections regarding their exercise were completed in a manner that deprived the Defendant of any meaningful due process.

First, based on the I-826, at best, the Defendant simultaneously made two contradictory choices as to a request for a hearing and the DHS Officers failed to take any measure to properly address that contradiction, to clarify the Defendant's intentions by asking him to complete a new Form (or initial his selection on the existing Form), or to provide the Defendant with the hearing he had requested (and that the I-826 informed him that he had a right to). This despite the Officers' own testimony that when

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[14] The Court in *Charleswell* uses "reasonable likelihood" and "reasonable probability" interchangeably.

[15] The Government elected not to present any evidence on this prong. (Gov't's Suppl. Resp. in Opp'n, ECF No. 79, at 3 n.1).

faced with such inherently contradictory choices, the standard and required procedure was to stop and definitely and definitively confirm the alien's true choice. (Tr. of Proceedings, ECF No. 30, 29:5–21.) At worst, a DHS Officer forged the Defendant's selection on the Defendant's I-826 in an effort to obstruct any rights to a hearing that the I-826 itself purported to offer.

Second, based on the I-851, the Defendant was handed an un-issued Notice of Intent where he was asked to waive further rights to contest removal or to request withholding of removal, twenty (20) minutes before the I-851 says it was received by and/or explained to the Defendant.

Third, all the waivers on both Forms supposedly occurred at the exact same minute, and the Officers testified (and the documents support) that the supposed waivers in reality actually occurred before the Forms were explained to the Defendant.

In an effort to confirm (or not) that facial reading of the Forms, the Court asked DHS Officer Darji the following while Officer Darji testified under oath:

> THE COURT: So within a few minutes somebody in your position would tell somebody that they have the right to a hearing. That person would have both requested a hearing and said they don't want a hearing. And then they would be told they don't get a hearing. Is that your testimony, sir?
>
> DHS OFFICER DARJI: This is a generic form, yes.
>
> THE COURT: Okay. But in the circumstance where it is a form 851 that is going to be used, in this specific circumstance, am I reading these

> forms inaccurately — or actually am I reading them accurately that within moments of 9 o'clock in the morning on June 23rd, 2011, several things had occurred pretty much all at once. This defendant was told he had a right to request a hearing. He requested a hearing. He said he didn't want a hearing. And he was told he couldn't have a hearing. **Am I reading those forms correctly, sir?**
>
> **DHS OFFICER DARJI: Yes.**
>
> **THE COURT: Does that make any sense at all to you, sir?**
>
> **DHS OFFICER DARJI: No, Your Honor.**

(Tr. of Proceedings, ECF No. 30, 61:21–62:14 (emphasis added).)

The Court concludes that the Defendant has shown by a preponderance of the evidence that DHS violated required and material procedural protections and due process regarding the removal process such that the 2011 Removal Proceeding was rendered fundamentally unfair. *See Charleswell*, 456 F.3d at 360. Not only was the Defendant deprived an opportunity for review by an immigration judge ("IJ") based on the I-826, likely because the I-826 was manipulated by the DHS Officers, but he also was not given sufficient opportunity to understand or review his rights (including to judicial review) on the I-851 before signing them away.

"No society is free where government makes one person's liberty depend upon the arbitrary will of another." *Hahn v. Burke*, 430 F.2d 100, 105 (7th Cir. 1970) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 217 (1953) (Black, J., dissenting)).

In effectuating the administrative removal of the Defendant in 2011, the involved DHS Officers acted with fundamental disregard of their obligations under federal law and the Due Process Clause, and that Removal process was contrary to law.

ii. Fundamental Error Caused Prejudice to the Defendant

The second prong of the third element requires the Defendant to show prejudice. This Court must determine whether there is a reasonable likelihood that the Defendant would have obtained relief had he not suffered from the fundamental errors identified above. *Charleswell*, 456 F.3d at 362. In extreme cases, where the procedural defects are "so central or core to a proceeding's legitimacy," the reasonable likelihood standard becomes too high a burden. *Id.* at 362 n.17. In such an extreme case, prejudice may be presumed. *Id.* (citing *United States v. Luna*, 436 F.3d 312, 321 (1st Cir. 2006)).

The Defendant argues that had the 2011 Removal Proceeding been conducted properly, and his request for a hearing so offered and so selected on the I-826 been honored, the Defendant could have then asserted a claim for asylum, withholding of removal, or Convention Against Torture (CAT) protection, and there is a reasonable likelihood that at least one of those claims would have been successful. The Government argues that the Defendant suffered no prejudice because he was not eligible for asylum or withholding of removal and he could not have asserted a successful CAT protection claim in 2011; therefore, the Defendant would have been deported regardless of

any error with the Forms or the 2011 Removal Process.

"[R]esolution of the prejudice issue in the § 1326(d)(3) context is somewhat akin to a trial within a trial. . . ." *Charleswell*, 456 F.3d at 362 (internal quotations omitted). After placing itself in the shoes of an IJ around the time of the 2011 Removal Proceeding,[16] the Court concludes that the Defendant had a reasonable likelihood of success on a claim for asylum, a claim for CAT protection, and a claim for withholding pursuant to § 1231(b)(3)(A) had his 2011 Removal Proceeding been conducted without fundamental error. However, beyond that, the Court also concludes that the flaws in the 2011 Removal Proceeding were so central to any notion of a legitimate removal proceeding that prejudice can and must be presumed in this case. Therefore, the Defendant satisfies the prejudice prong of the third element.

a. Asylum

First, the Government argues that even if the Forms had been executed properly, the Defendant would not have had the opportunity to seek asylum because he is an "aggravated felon"[17] as a result of his New Jersey

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[16] Of course, the necessity of this Court's considering these issues now by looking in the rearview mirror is solely and completely the result of the actions of the DHS Officers in 2011. If they had followed the law, and what they themselves said they should have done when presented with conflicting elections by the Defendant, there likely would be no need to delve into these issues now, as they would have been addressed one way or the other back then.

[17] As that term is defined at § 101(a)(43)(F) of the Immigration Act, 8 U.S.C. § 1101(a)(43)(F).

state conviction for aggravated assault. This status is important, asserts the Government, because aggravated felon status has serious implications in removal proceedings: in the Defendant's case, not only did his aggravated felon status enable DHS to initiate expedited administrative removal proceedings against him,[18] his aggravated felon status also made him *per se* ineligible for asylum. Thus, argues the Government, the Defendant's expedited deportation was unavoidable. The Defendant argues that if he had been properly informed of his rights, he would have challenged his aggravated felon status, likely been successful, and could have made a likely successful claim for asylum.

1. The Defendant was eligible for asylum because he was not an aggravated felon.

The Government is correct that aggravated felons are ineligible for asylum,[19] so whether the Defendant could have had even a possibility of gaining asylum

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[18] Pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.") and § 1228 (authorizing "expedited" removal of aliens convicted of committing aggravated felonies).

[19] "But the noncitizen who is not an aggravated felon may seek discretionary relief from removal, such as asylum, provided he satisfies the other eligibility criteria." *Johnson v. Attorney Gen. of U.S.*, 596 F. App'x 117, 123 (3d Cir. 2014). The asylum statute, 8 U.S.C. § 1158, states that "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." § 1158 (b)(2)(B)(i). In turn, an alien who has "been convicted by a final judgment of a particularly serious crime" is not eligible for asylum. § 1158(b)(2)(A)(ii). For further discussion on the definition of a "particularly serious crime," in regard to the issues in this case, see *infra* note 38.

during his 2011 Removal Proceeding depends on whether the Defendant was properly charged by DHS as an aggravated felon.[20]

In the immigration context, an "aggravated felony" includes any "crime of violence [defined in 18 U.S.C. § 16 but excluding purely political offenses] for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). The Defendant's term of imprisonment in New Jersey exceeded one year. A "crime of violence," 18 U.S.C. § 16, has two alternative definitions:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. Thus, the Court must determine whether the Defendant's New Jersey aggravated assault conviction qualifies as a "crime of violence" under either prong. If it does, the Defendant is (and was) an aggravated

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[20] The Government also argues that the Defendant could have been charged by DHS as having been convicted of a crime of moral turpitude pursuant to 8 U.S.C. § 1227(a)(2)(A)(i). (*See* Gov't's Resp. to Def.'s Mot., ECF No. 17, at 11 n.5.) However, the DHS did not charge the Defendant under that subsection in the 2011 Removal Proceeding, instead electing to charge him under § 1227(a)(2)(A)(iii). *See* Form I-851, at 1, Ex. B. Thus, the Government's argument is beyond the scope of this collateral attack on this underlying removal order.

felon for immigration purposes and could not have successfully claimed asylum in 2011. If it is reasonably likely that the Defendant could have successfully challenged his conviction being labeled as a "crime of violence," then he would have been eligible to present an asylum claim, as he would not have been labeled an aggravated felon.

i. Section 16(a)

Although courts typically employ the categorical approach to determine whether a state offense meets a federal definition,[21] *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013), if the state offense lists elements in the alternative (e.g., acting knowingly *or* recklessly) and only some of those alternatives fit the federal definition, the court must apply the "modified categorical approach." *Johnson*, 596 F. App'x at 120. Both parties agree that the aggravated assault offense lists elements in the alternative, so the Court must utilize the modified categorical approach when

[21] "Under this approach, [courts] look 'not to the facts of the particular prior case,' but instead to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony. *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)).

comparing N.J. Stat. Ann. § 2C:12-1(b)(1) (2009)[22] to the definitions in 18 U.S.C. § 16(a) and (b).[23]

Under this modified categorical approach, the Court must "consult a limited class of documents . . . to determine which alternative formed the basis of the defendant's prior conviction" and then determine if that basis meets the definition of a crime of violence. *Descamps v. United States*, 570 U.S. 254, 257 (2013). A court applying the modified categorical approach determines the basis of the conviction based on "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States*, 544 U.S. 13, 16 (2005).

Here is what the Court knows from the *Shepard* materials in this case. First, the statute at issue reads: "A person is guilty of aggravated assault if he: (1) Attempts to cause serious bodily injury to another, *or* causes such injury purposely or knowingly *or* under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury." N.J. Stat. Ann. § 2C:12-1(b)(1) (emphasis added). The New Jersey indictment charged that the Defendant "purposely did attempt to cause serious bodily injury." (Def.'s App. 114, "State Indictment.") The New Jersey

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[22] The Defendant was convicted of aggravated assault on December 11, 2009, under N.J. Stat. Ann. § 2C:12-1(b)(1). (J. of Conviction and Order for Commitment, Def.'s App. 112.) This statute has been updated since the Defendant's conviction, but for the purposes of this Opinion, the Court relies on the statute as it read on the date of conviction.

[23] Gov't's Suppl. Resp., ECF No. 79, at 6; Def.'s Reply, ECF No. 82, at 7.

Judgment of Conviction and Order for Commitment does not indicate which alternative scienter element served as the basis for conviction. (Def.'s App. 112.) The Defendant pled guilty, and a video and audio recording of his plea colloquy was submitted into the record along with a transcript of the recording. (Def.'s Ex. Q; 2d Suppl. App. to Def.'s Reply to Gov't's Suppl. Resp. ("Def.'s 2d Suppl. App.") 9–11, ECF No. 82.) With the aid of an interpreter, the Defendant answered the following questions during his state court plea colloquy:

> DEFENSE ATTORNEY: It's an aggravated assault.
>
> THE COURT: Yeah, but did he attempt — did he attempt to create serious bodily injury? Significant bodily injury, right?
>
> PROSECUTOR #2: Yeah, serious.
>
> THE COURT: Serious bodily —
>
> (There was a discussion among counsel and interpreter.)
>
> INTERPRETER: I'm sorry, maybe I interpreted incorrectly the question. I apologize. I apologize. The intent—
>
> THE COURT: Okay. Did you intend to commit serious bodily injury when you stabbed the individual?
>
> INTERPRETER [on behalf of the Defendant]: No.
>
> PROSECUTOR #1: But you knew about using a knife to stab somebody in a fight, you could have caused serious bodily injury?
>
> INTERPRETER [on behalf of the Defendant]: Yes.

(Def.'s Ex. Q; Def.'s 2d Suppl. App. 9–11.)

While it is clear from the State Indictment that New Jersey charged the Defendant with an attempt to cause serious bodily injury,[24] the plea colloquy shows that the Defendant did not admit to intending to commit serious bodily injury.[25] After consulting the *Shepard* documents, the Court concludes that the Defendant admitted to recklessly causing serious bodily injury under circumstances manifesting extreme indifference to the value of human life, and that admission of recklessness was the basis for his conviction. To be clear, this is not simply a conclusion that it would be reasonably likely that an IJ would reach this conclusion; it is a conclusion that as a matter of law, the Defendant pled to a reckless level of scienter.

New Jersey defines "recklessly" as:

> consciously disregard[ing] a substantial and unjustifiable risk that the material element exists

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[24] "[W]here a subsection of the Code defines an offense as an attempt to cause and also as causing serious bodily injury or bodily injury, the attempt is a separate offense." *New Jersey v. McAllister*, 511 A.2d 1216, 1221 (N.J. Super. Ct. App. Div. 1986). "A defendant may be convicted of an offense included in an offense charged whether or not the included offense is an indictable offense. An offense is so included when: . . . (3) It differs from the offense charged only in the respect that a . . . lesser kind of culpability suffices to establish its commission." N.J. Stat. § 2C:1-8(d).

[25] It is well established that attempt cannot be proven without a mental state of specific intent. *Singh v. Gonzales*, 432 F.3d 533, 539 (3d Cir. 2006); *Knapik v. Ashcroft*, 384 F.3d 84, 91 (3d Cir. 2004) ("[T]he concept of an attempted recklessness crime is nonsensical.").

> or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

N.J. Stat. § 2C:2-2(b)(3). The Defendant did not plead to the higher level of culpability, which is to act "knowingly," because "[a] person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result." N.J. Stat. § 2C:2-2(b)(2). The nature of the admitted statement, "you knew about using a knife to stab somebody in a fight you *could* have caused serious bodily injury," is insufficient to establish that the Defendant was aware that it was practically certain that his conduct would cause serious bodily injury. (Def.'s 2d Suppl. App. 11 (emphasis added).)

Neither the state trial judge nor the state prosecutor followed up with more specific questions in the colloquy to determine if the level of culpability rose to the level of "knowingly," and there is no evidence in the record that the trial judge made any factual findings as to which level of culpability the Defendant was guilty of. Without more, the Court is left with the admission in the colloquy, which only establishes a recklessness level of culpability.

The question now becomes whether reckless aggravated assault is the type of offense captured by § 16(a). If it is, then the Defendant committed a crime of violence, as defined by 18 U.S.C. § 16(a), and the offense qualified as an aggravated felony under

immigration law in 2011, as defined in 8 U.S.C. § 1101 (a)(43)(F). If it is not, the Defendant did not commit a crime of violence and would not have been an aggravated felon in 2011.

Contrary to the Government's assertion,[26] the Supreme Court has specifically left unresolved the issue of whether reckless assault crimes qualify as a crime of violence under § 16. *Voisine v. United States*, 136 S. Ct. 2272, 2280 n.4 (2016) ("[O]ur decision today concerning § 921(a)(33)(A)'s scope does not resolve whether § 16 includes reckless behavior."). Noting the open question, our Court of Appeals also declined to answer this question with respect to § 16(b) in *Baptiste v. Attorney Gen. of U.S.*, 841 F.3d 601, 607 n.5 (3d Cir. 20 1 6).[27] *Baptiste* also offered no guidance on § 16(a). *Id.* at 606 n.4 ("BIA[28] did not address [§ 16(a)] and so we similarly do not address it here.").

The Defendant argues that our Court of Appeal's 2005 ruling in *Popal v. Gonzales* remains controlling law in the Third Circuit on this point. 416 F.3d 249 (3d Cir. 2005). *Popal* made plain that, for purposes of § 16(a),[29] "crimes with a mens rea of recklessness do

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[26] ECF No. 79 at 7, n.6.

[27] "Since we conclude Baptiste's 2009 Conviction falls within our more-circumscribed interpretation of § 16(b), we need not examine to what extent the reasoning of *Voisine* applies in the § 16(b) context to broaden our existing interpretation of the provision. We leave that question for another day." *Baptiste*, 841 F.3d at 607 n.5.

[28] Board of Immigration Appeals

[29] The Court of Appeals narrowed the *Popal* holding in *Victor Jair Aguilar v. Attorney Gen. of U.S.* to only apply to § 16(a) and not § 16(b). 663 F.3d 692 (3d Cir. 2011) ("[C]rimes carrying a

not constitute crimes of violence." *Id.* at 251. District courts in our Circuit continue to follow *Popal*. In 2017, the Eastern District of Pennsylvania concluded that a defendant's Pennsylvania aggravated assault conviction, 18 Pa. Cons. Stat. § 2702(a), was not a "crime of violence" under § 4B 1.2(a) of the Sentencing Guidelines[30] because the defendant's mens rea did not rise above recklessness.[31] *United States v. Haines*, No. 11-cr-706, 2017 U.S. Dist. LEXIS 180613, at *17 (E.D. Pa. Oct. 30, 2017); *see also Nelson v. United States*, No. 16-cv-3409, 2017 U.S. Dist. LEXIS 5116, at *16 (D.N.J. Jan. 12, 2017) (concluding that New Jersey's assault statute could be satisfied by recklessness alone and "under the elements clauses of the Sentencing

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mens rea of recklessness may qualify as crimes of violence under § 16(b).").

[30] Section 4B1.2(a) of the Sentencing Guidelines is virtually identical to the language of 18 U.S.C. § 16(a), with the exception that § 16(a) "includes the use of force 'against the *person or property* of another,' while U.S.S.G. § 4B1.2(a)(1) is limited to the use of force 'against the *person* of another.'" *United States v. Haines*, No. 11-706, 2017 U.S. Dist. LEXIS 180613, at *12 n.29 (E.D. Pa. Oct. 30, 2017). As explained in *United States v. Dates*, "the definition of 'crime of violence' in Section 4B1.2(a)(1) mirrors that in Section 16(a), and thus authority interpreting one is generally applied to the other, unless pertinent distinctions—none of which are present here—are present." No. 6-cr-83, 2016 WL 5852016, at *3 (W.D. Pa. Oct. 6, 2016).

[31] In *Haines*, any *Shepard* documents related to the defendant's aggravated assault conviction were lost, so neither party could establish which mens rea element served as the basis of conviction since the statute in question gave alternative levels of culpability: intentionally, knowingly, or recklessness with extreme indifference, and simple recklessness. 2017 U.S. Dist. LEXIS 180613, at *7 (discussing Pennsylvania's aggravated assault statute, 18 Pa. Cons. Stat. § 2702(a)).

Guidelines, § 16(a), and the virtually identical language in the ACCA,[32] a crime requiring only recklessness as to the 'use' of force will not qualify as a crime of violence"). In 2016, this Court declined to presume that a guilty plea that failed to specify mens rea qualified as a crime of violence when the divisible statute was not categorically a crime of violence, even though it was "exceedingly unlikely[ ] that his plea arrangement implicated something other than" one of the qualifying mens rea. *United States v. Dates*, No. 6-cr-83, 2016 WL 5852016, at *3 (W.D. Pa. Oct. 6, 2016).[33]

Thus, the Defendant's underlying conviction cannot as a matter of law qualify as a crime of violence under 18 U.S.C. § 16(a) and is insufficient to support aggravated felon status under 8 U.S.C. § 1101 (a)(43)(F).

ii. Section 16(b)

Our Court of Appeals has held that § 16(b) is unconstitutionally vague in the immigration context and therefore invalid. *Baptiste*, 841 F.3d at 615–21. Just recently, the Supreme Court reached the same holding in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Even though the *Baptiste* and *Dimaya* holdings occurred well after the Defendant's 2011 Removal

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[32] Armed Career Criminal Act, 18 U.S.C. § 924.

[33] As this Court noted in *Dates*, "[t]he Supreme Court has generated a 'demand for certainty' when determining whether a defendant was convicted of a qualifying offense. *Shepard*, 544 U.S. at 21. In other words, a court must be certain about 'what matters,' which 'is the mens rea to which [a defendant] actually pled guilty.'" 2016 WL 5852016, at *3 (citing *United States v. Johnson*, 587 F.3d 203, 212–13 (3d Cir. 2009)).

Proceeding, the Court concludes that there is a reasonable likelihood that had the Defendant not been deprived of his ability to challenge the constitutionality of § 16(b) beginning at that time, he would have ultimately been successful.

Had the Defendant gotten the ball rolling by using the available mechanisms to challenge his removal at that time, he would have likely ultimately had a successful result. Given that the arguments that were being asserted around that time in these regards in other cases have actually proven successful, the Court concludes that that is enough for the Defendant to carry his burden here.[34] And this approach is consistent with the question at the core of the analysis and holding in *Charleswell*, that is whether there is a reasonable likelihood that the "result" would have been different if the error in the removal proceeding had not occurred. *Charleswell*, 456 F.3d at 362. And contrary to the contention of the Government that this Court is constrained to consider only the state of the law to be applied by the IJ at the initial administrative hearing, ECF No. 79, at 12–14, the *Charleswell* Court expressly focused on the "result" in the context of the alien advocating his position on direct appeal. 456 F.3d at 362. Since a "fundamental defect" or error that renders a removal proceeding "fundamentally unfair" for purposes of § 1326(d) includes the denial of a statutory right to appeal, this Court is obligated to consider not simply the likely "result" of the Defendant's hypothetical initial hearing before an IJ, but also the "result" of the Defendant's use of all of the

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[34] *See United States v. Gonzalez Segundo*, No. 4:10-cr-0397, 2010 WL 4791280, at *10 n.8 (S.D. Tex. Nov. 16, 2010).

legal processes that would have been available to him. *Id.*[35]

The argument that § 16(b) was unconstitutionally vague was indeed successful at our Court of Appeals in *Baptiste*. Baptiste's removal proceedings were instituted only nineteen months after the Defendant's, and the underlying "aggravated felony" involved there also arose under New Jersey's aggravated assault statute. *Baptiste*, 841 F.3d at 604.

But the constitutionality of § 16(b) was a hot topic in Circuits beyond, and indeed prior to, the Third Circuit's decision in *Baptiste*. For instance, the Tenth Circuit held § 16(b) unconstitutionally vague with respect to an immigration removal proceeding that began in 2012. *Golicov v. Lynch*, 837 F.3d 1065, 1067 (10th Cir. 2016). In *Golicov*, the Defendant was charged as an aggravated felon by DHS in 2012, and he moved to terminate the removal proceedings. *Id.* The Tenth Circuit ultimately vacated the order of

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[35] That also makes this case fundamentally different than the situation in *United States v. Torres*, 383 F.3d 92 (3d Cir. 2004). In *Torres*, it was conceded that the defendant was provided with a full and fair process, so our Court of Appeals concluded that the IJ's application of then-existing law (later changed) was not a due process violation. *Id.* at 104. *Torres* does not address the situation present here where the process for an IJ hearing and judicial review was stopped dead in its tracks by the actions of the DHS Officers. The question in *Torres* "was whether an error of law denying an alien discretionary relief to which he may have been entitled rendered an otherwise procedurally fair proceeding unfair." *Charleswell*, 456 F.3d at 359. The *Torres* Court "did not address the meaning of 'fundamental unfairness' in the context of a defendant who was challenging some procedural defect in the underlying proceeding," such as the deprivation of the right to administrative remedies and judicial review by DHS officers. *Id.*

removal and remanded the case to the BIA. *Id.* Prior to *Golicov* decision, the Court of Appeals for the Seventh Circuit held § 16(b) unconstitutionally vague, vacating a defendant's sentence. *United States v. Vivas-Ceja*, 808 F.3d 719, 720 (7th Cir. 2015).

These Court of Appeals decisions were largely anchored in the Supreme Court's 2015 *Johnson v. United States* opinion, which declared the parallel ACCA residual clause unconstitutionally vague. *See* 135 S. Ct. 2551. But, earlier Supreme Court dissents and concurrences had questioned the validity of such a residual clause prior to the decision in *Johnson* and the Defendant's 2011 Removal Proceeding. *Id.* at 2562–63; *Sykes v. United States*, 564 U.S. 1, 28 (2011) (Scalia, J., dissenting) ("We should admit that ACCA's residual provision is a drafting failure and declare it void for vagueness."); *Chambers v. United States*, 555 U.S. 122, 134 (2009) (Alito, J., concurring) ("[E]ach new application of the residual clause seems to lead us further and further away from the statutory text."). The argument that § 16(b), which parallels the ACCA's residual clause,[36] is unconstitutionally vague was an argument ripe for the taking at the time that the Defendant could have (but for the invalid waivers) invoked it at the appropriate proceeding in order to

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[36] The Supreme Court's respective analyses of the ACCA's residual clause and § 16(b) have "perfectly mirrored" one another. *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 562 (7th Cir. 2008) (comparing *Begay v. United States*, 553 U.S. 137 (2008), and *Leocal v. Ashcroft*, 543 U.S. 1 (2004)). In fact, the Solicitor General stated in his supplemental brief in *Johnson* that § 16(b) "is equally susceptible" to the vagueness issue facing the ACCA residual clause. Gov't's Suppl. Br. at 22, *Johnson*, 135 S. Ct. 2551 (No. 13-7120), 2015 WL 1284964, at *22.

challenge his administrative removal. Indeed, defendants were making the vagueness challenge with respect to the ACCA's parallel residual clause at the time of the Defendant's Removal Proceeding. *See, e.g.*, *United States v. Hammons*, No. 07-cr-1164, 2012 U.S. Dist. LEXIS 4739, at *46 (D.N.M. Jan. 12, 2012).

By the time that such an argument would have worked its way through the appellate structure of the immigration courts to our Court of Appeals, the matter likely would have already been resolved—in the Defendant's favor. After all, similarly situated defendant, James Garcia Dimaya, who was placed in removal proceedings *in 2010*, prevailed on his § 16(b) argument at the Supreme Court (after prevailing in the Ninth Circuit) nearly eight years later. *See* Resp't's Br. at 5–6, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Thus, it is reasonably likely that near-identical inputs here would have resulted in a near-identical output.[37] Therefore, it is reasonably likely that the Defendant could have successfully challenged his conviction being labeled as a "crime of violence" under § 16(b) had he been given the opportunity to challenge that label beginning during his 2011 Removal Proceedings.

After analyzing both prongs of § 16, the Court concludes it is reasonably likely that had the Defendant challenged his aggravated felon status when he was removed, he would have ultimately succeeded. Therefore, he would have been eligible to

[37] Thus, contrary to the Government's assertion (ECF No. 79, at 14), there is a reasonable likelihood that the Defendant "would have been" Johnson or Baptiste or Dimaya.

present an asylum claim.[38] The next question is whether the Defendant had a reasonably likely chance of success on the merits of that asylum claim.

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[38] The Government also contends that regardless of the aggravated felony issue, the Defendant would have been ineligible for asylum on the basis that his conviction still qualified as a "particularly serious crime" as that term is used in the asylum statute, 8 U.S.C. § 1158(b)(2)(A)(ii). Subsection (b)(2)(B) provides that a "particularly serious crime" encapsulates aggravated felonies *and* any offense that has been so designated by the Attorney General through regulations. 8 U.S.C. § 1158(b)(2)(B)(i)–(ii). The Government does not argue that the New Jersey conviction at issue here is one that is specifically so designated in any regulation. Instead, the Government appears to argue that case-by-case adjudication could result in an offense that is not an aggravated felony being classified by the immigration courts as a particularly serious crime. (Gov't's Suppl. Resp. in Opp'n, ECF No. 79, at 10.) Our Court of Appeals may have arrived at the conclusion that § 1231(b)(3)(B) permits case-by-case adjudication by the BIA, *see Denis v. Attorney Gen. of U.S.*, 633 F.3d 201, 214 (3d Cir. 2011), but our Court of Appeals has also held in the withholding of removal context that "to be eligible for classification as a 'particularly serious crime,' an offense must be an aggravated felony as defined in the INA at 8 U.S.C. 8 1101 (a)(43)." *Alaka v. Attorney General of U.S.*, 456 F.3d 88, 104 (3d Cir. 2006).

Alaka addressed a claim for withholding of removal. Nonetheless, this Court sees no persuasive reason why *Alaka's* statutory construction of a "particularly serious crime" would not equally apply to that same term as it is used in the asylum provision within the same Act. *See Johnson v. Attorney Gen. of U.S.*, 605 F. App'x 138, 144 (3d Cir. 2015) (declining to "decide whether *Alaka* applies in the asylum context or reevaluate that decision because the issue was neither briefed by the parties nor is necessary to resolve this case"). The Court is not persuaded by the Government's argument that although *Alaka* remains valid Circuit law, this Court should disregard it in light of the BlA's later interpretation of the statute, *In re N-A-M-*, 24 I. & N. Dec. 336, 338 (BIA 2007). This Court is bound to follow our Court of

2. It is reasonably likely that the Defendant's asylum claim in 2011 would have been successful

Multiple members of the Defendant's family have applied for, and in some cases been granted, asylum. Because the Defendant avers he would assert asylum on the basis of the same events from which his family has asserted asylum claims, the Court begins with a summary of those other asylum applications.

First, the Defendant's sister ("Sister"), who purportedly came to the United States in March 2012, sought asylum, and her application remains active. (App. to Def.'s Suppl. Br. Regarding Prejudice ("Def.'s Suppl. App.") 337, ECF No. 69-1; Tr. of Proceedings, ECF No. 31, 94:11–20.) DHS made a finding that there was a "significant possibility" that her claim would be found credible in a full asylum hearing and that she had established a credible fear of persecution. (Def.'s Suppl. App. 349, ECF No. 69-1.) Her hearing has not yet occurred. (ECF No. 31, 94:11–20.) According to Sister's testimony in this case, her application for asylum is based on her history of suffering abuse and rape in El Salvador, which led to Sister testifying against her rapist and the rapist being convicted and sentenced for that crime. (Def.'s Suppl. App. 356.) As a result, her rapist and his comrades made threats that they "wanted to murder

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Appeals' precedential decisions, and when such a decision remains good law, this Court is not in a position to deviate from that foundational principle on the basis that the BIA (or even other Circuits) disagree. The long and the short of it is that this Court is obligated to recognize that *Alaka* has not been overturned, and remains Circuit precedent. *See Aguilar v. Attorney Gen. of U.S.*, 665 F. App'x 184, 188 n.4 (3d Cir. 2016).

me *and my family."* (*Id.* (emphasis added).) In fact, Sister was involved in subsequent court proceedings against the rapist in 2008. (ECF No. 31, 58:20–23, 60:3–10, 109:10–23.)

The Defendant's mother ("Mother") also had an asylum application with the United States. (ECF No. 31, 106:21–23.) The basis for her application is the situation with Sister (her daughter) because "they were threatening us that they were going to kill us and that they were going to bum down our house." (ECF No. 31, 107:18–108:7.) The threats began in 2008 and continued through 2011, after Mother testified in the trial of Sister's rapist "sometime after September 2010." (ECF No. 31, 108:20–109:23; Def.'s Suppl. App. 356.) According to a 2015 letter from the Department of Justice, the case had not been designated as pending by DHS, so the asylum application was rejected. (Def.'s 2d Suppl. App. 3–4.)

The Defendant's brother ("Brother") was granted asylum on September 9, 2015. (Def.'s Suppl. App. 67–75.) Brother testified that his application was based on his fear of gangs in El Salvador because the gangs threated him *and his family* after he refused to join them. According to the Department of Justice's summary of Brother's testimony, the threats began in November 2011 and increased until his departure from El Salvador in June 2013. (*Id.*)

According to DHS paperwork, the Defendant's cousin ("Cousin") applied for asylum and withholding of removal in November 2012 after entering the United States in March 2012. According to Cousin's application, he testified in a rape trial in Honduras and the alleged rapist's father threatened Cousin *and*

his family. That father sent two hit men to kill Cousin and Cousin's brother, and the hit men successfully killed Cousin's brother on February 11, 2011. (Def.'s Suppl. App. 5.) Then, on April 27, 2011, the father sent four hit men to bomb the home of Cousin and his family, but Cousin and Cousin's mother ("Aunt") managed to escape. (*Id.* at 5–6.) Cousin's application also states that Cousin and his family tried to hide with their family in El Salvador in 2011, but they were discovered (by people associated with the rapist's father), and they decided to come to the United States. (*Id.* at 7.) This matched the Defendant's testimony that when he was removed to El Salvador at the end of 2011 as a result of the Removal Order, he was reunited with his Aunt and returned to the United States with her because "the man was paying good money to have her found." (Tr. of Proceedings, ECF No. 31, 127:7–12.) The current status of Cousin's asylum claim is unknown to the Court.

The Defendant's aunt ("Aunt") also has a pending asylum application because her son was murdered. (ECF No. 31, 111 :9–11.) DHS issued "credible fear" findings that Aunt had established a credible fear of persecution. (Def.'s Suppl. App. 57.) The current status of Aunt's asylum claim is unknown to the Court.

Our Court of Appeals summarized the elements of an asylum claim in *Garcia v. Attorney Gen. of U.S.*:

> [A]n application for asylum must establish only that the applicant is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of past persecution or a well-founded fear of future persecution on account of race, religion,

> nationality, membership in a particular social group, or political opinion, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i); 8 C.F.R. § 1208.13(b)(1). An applicant has a well-founded fear of persecution if there is a reasonable possibility that she will suffer it, 8 C.F.R. § 1208.13(b)(2)(i), and a showing of past persecution creates a rebuttable presumption of such a well-founded fear, 8 C.F.R. § 1208.13(b)(1). The persecution must be committed by the government or forces the government is either unable or unwilling to control.

665 F.3d 496, 503 (3d Cir. 2011) (internal quotations and citation omitted). While there is no evidence in the record that the Defendant personally suffered past persecution of any kind, a person need not have suffered personal past persecution to qualify for asylum so long as he or she has a well-founded fear of future persecution.

> To prove a well-founded fear of persecution, an applicant must meet a two-pronged test. First, the applicant must demonstrate a subjective fear of persecution "through credible testimony that [his] fear is genuine." Second, the applicant must show that "a reasonable person in the alien's circumstances would fear persecution if returned to the country in question."

Pavlov v. Attorney Gen. of U.S., 614 F. App'x 55, 62 (3d Cir. 2015) (quoting *Lie v. Ashcroft*, 396 F.3d 530, 536 (3d Cir. 2005)). "Nonetheless, an applicant's fear may be well-founded even if there is only a slight, though discernible, chance of persecution." *Karangwa v. Attorney Gen. of U.S.*, 649 F. App'x 149, 153 (3d Cir.

2016); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421,431 (1987) (noting that a ten percent (10%) chance of being shot, tortured, or persecuted does not preclude "well-founded fear"). This Court also bears in mind the standard it is to apply here: a reasonable likelihood of success of such a claim. In essence, the Court must ask if there is a reasonable likelihood that the Defendant could show a "well-founded fear of future persecution" on the basis of the Defendant's membership in a particular social group, and that the Salvadoran government is unable or unwilling to control that persecution.

The Court concludes that the Defendant meets that burden. First, the Court concludes that he would have demonstrated a sufficiently genuine subjective fear of persecution. The Defendant's testimony in this case is credible and was corroborated by both other testifying (family member) witnesses and the documents produced by the Government. (*See* Tr. of Proceedings, ECF No. 31, 56:4–127:13.) Second, the Defendant satisfies his burden to show that "a reasonable person in the alien's circumstances would fear persecution if returned to the country in question." *Pavlov*, 614 F. App'x at 62. The Defendant is clearly at risk of further persecution on account of membership in a particular social group, his family in which members testified against rapists.[39]

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[39] This is also why the Government's argument that a one-year time limit for raising asylum claims necessarily bars any claim by the Defendant fails. A major exception to that one-year period is available when changed circumstances exist that materially affect eligibility for asylum. 8 U.S.C. § 1158(a)(2)(B) & (D); 8 C.F.R. § 208.4(a)(4). The record reflects that Sister entered the United States in March 2012, and Mother testified that the

"[A]n applicant for asylum or withholding of removal seeking relief based on 'membership in a particular social group' must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Matter of M- E- V- G-*, 26 I. & N. Dec. 227, 237 (BIA Feb. 7, 2014). "Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups." *Valdiviezo-Galdamez v. Attorney Gen. of U.S.*, 663 F.3d 582, 599 (3d Cir. 2011) (quoting *In re C-A*, 23 I. & N. Dec. 951, 959 (BIA 2006), *aff'd sub nom. Castillo-*

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threats to the family occurred in 2011, driving Sister to eventually flee the following March. In addition, the events with Cousin and the murder of the Defendant's other cousin occurred within just a few months of the 2011 Removal Proceedings, and the threats against cousin were also directed at Cousin's family. (Def.'s Suppl. App. 5–7.) It is clear from the record that the violence against this family had escalated in 2011 beyond what that family could safely tolerate. *See Singh v. Holder*, 656 F.3d 1047, 1053 (9th Cir. 2011) (remanding case to BIA to consider changed circumstance related to wife's recent attacks in India while husband was in the United States); *Fakhry v. Mukasey*, 524 F.3d 1057, 1063–64 (9th Cir. 2008) (petitioner might qualify for changed circumstances exception when relevant circumstances simply provide further evidence of the type of persecution already suffered rather than a new basis for persecution); *Vahora v. Holder*, 641 F.3d 1038, 1043 (9th Cir. 2011) (concluding IJ plainly erred in its finding that there was no change in conditions when petitioner's family became seriously impacted by renewed unrest in the country including his family's house being burned down and petitioner's brother's disappearance).

Arias v. Attorney Gen. of U.S., 446 F.3d 1190 (11th Cir. 2006)).[40]

Despite that concise language, the definition of a "particular social group" is a term that has resulted in varied holdings and applications, including around the

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[40] On June 11, 2018, the Attorney General issued his Opinion in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), in which the Attorney General clarified various several aspects of the legal standard he directed be applied by immigration judges for asylum eligibility, instructing immigration judges to apply the standard for defining a cognizable "particular social group" as was set out in *Matter of M- E- V- G-*, which was on remand from our Court of Appeals. 26 I. & N. Dec. 227. Although the Attorney General questioned in *Matter of A-B-* whether, as to a specific case, "a nuclear family can comprise a particular social group," 27 I. & N. Dec. at 333 n.8, *Matter of A-B-* did not resolve that issue as a general matter, instead clarifying that immigration courts are to apply a more rigorous framework on a case-by-case basis to test the alleged status of a particular social group. What can be said here is that the "particular social group" involved in this "case within a case" is defined by an immutable characteristic, one that is specific, particular, and distinct, namely prosecution witnesses in rape trials and their family members. The Defendant's membership in such specific, particular "social group" is a central reason for the persecution alleged. *Matter of A-B-*, 27 I. & N. Dec. at 317. To be sure, this is not a group or claim defined by a generalized (but real) social ill, such as domestic violence broadly defined, a general societal vulnerability (such as a general risk of gang violence), nor a vague assertion of generally ineffective policing in the country of origin. *See id.* at 320, 331, 335. Further, it is a particular social group that exists independently of the asserted harm. Consequently, even if *Matter of A-B-* would be applicable to asylum proceedings that would have begun seven years ago, this Court concludes that on the facts presented here, *Matter of A-B-* does not alter the Court's conclusion that the Defendant likely would have been successful in presenting an asylum petition had he been given the proper opportunity to do so.

time the Defendant was in Removal Proceedings.[41] Applying the law as it was around the time the Defendant would have been asserting his claim for asylum but for the fundamental error is a difficult task given the passage of time and the evolution of events. But in doing so, the Court may and should consider cases in that time frame with facts similar to those in the record in this case.

One case in particular, from the Fourth Circuit in 2011, is notably on point. *Crespin-Valladares v. Holder*, 632 F.3d 117, 120 (4th Cir. 2011). The Crespins, Salvadoran citizens, sought asylum based on events arising from the murder of a cousin in El Salvador. *Id.* Following the murder, Mr. Crespin and his uncle gave descriptions of the murderers to the police and agreed to testify against the murderers, leading to convictions. Around the time of the trial, Crespin and his uncle received death threats. *Id.* Although the uncle received some police protection, all protection ceased when the trial was over. *Id.* Crespin, his wife, and their children entered the United States and applied for asylum based on "membership in a social group consisting of family members of those who actively opposed gangs in El Salvador by agreeing to be prosecutorial witnesses." *Id.* at 121–22. The IJ granted the asylum application for the family, but the BIA vacated, stating "those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses' does not qualify as a particular social group." The Court of Appeals for the Fourth Circuit concluded that the BIA committed legal error because it misunderstood the claimed social

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[41] *Matter of A-B-*, 27 I. & N. Dec. 316, 331 (A.G. 2018).

group. The *Crespin-Valladares* Court thoroughly analyzed whether family members of prosecutorial witnesses constituted such a particular social group, and it concluded that it does. *Id.* at 124–26.

This Court concludes that the reasoning of *Crespin-Valladares* persuasively demonstrates the reasonable likelihood that had the Defendant been in a position to move apace with an asylum effort beginning in 2011, he would have been able to establish membership in such a particular social group, as the analysis and outcome in *Crespin-Valladares* demonstrates.[42]

The Defendant has also met his burden to show such persecution would be either committed by the Salvadoran government or by forces the Salvadoran government is either unable or unwilling to control. *See Garcia*, 665 F.3d at 503. In processing Sister's asylum application, an asylum officer of DHS made a finding that the source of the threats had access to "financial wherewithal and societal influence to accomplish his objective of killing [Sister], possibly with the help of police. Current [El Salvador] conditions appear to generally support [Sister's] fear the police might kill her on his behalf." (Def.'s Suppl.

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[42] While it is certainly theoretically possible that the outcome in *Crespin-Valladares* may have been different had it been decided today in light of the recent *Matter of A-B-* Opinion, the Court concludes that it is substantially more likely that it would not have been different at all, as the analysis in *Crespin-Valladares* does not vary from the framework clarified in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018). Simply stated, *Matter of A-B-* does not appear to the Court to call into question the validity of *Crespin-Valladares*.

App. 359.)[43] Similarly, Cousin had fled to El Salvador but that country was unable to protect him from the same dangerous men.

Furthermore, although it is true that the Salvadoran authorities were helpful and effective in prosecuting Sister's rapist, that assistance occurred before the threats began and is not enough to overcome this evidence of the very real possibility (one recognized by DHS as credible) that the Salvadoran police would acquiesce to revenge killing in this case. *See De La Rosa v. Holder*, 598 F.3d 103, 110 (2d Cir. 2010)[44]

The Defendant's own cousin was murdered because the perpetrators were unable to kill the brother, a clear example of revenge upon family members (especially a sibling in retaliation for testifying in rape

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[43] These findings stem from a "credible fear interview" in the course of an asylum application. A credible fear interview has a different purpose than the actual asylum hearing, but the Court finds DHS's (albeit, preliminary) assessment of these events in El Salvador persuasive when it is being asked to make predictions about the outcome of these very processes. (*See* Joint Stip., ECF No. 87.) The Court also concludes that these findings are corroborated by the testimony of the Defendant's family members.

[44] In *De La Rosa*, the Court of Appeals for the Second Circuit remanded a BIA final decision and order that had denied the petitioner's CAT claim. The BIA concluded that the petitioner failed to meet the public official requirement because there was evidence that some persons within the Dominican government had taken steps to prevent his torture by investigating the petitioner's complaints and making arrests. The court disclaimed the BIA's assumption that the activity of these officials overcame the other public officials' complicity, the governmental corruption, and the general ineffectiveness of the government to prevent unlawful killings. *De La Rosa*, 598 F.3d at 110.

trials). This reality combined with the fact that threats made to Sister also directly referenced her family leads the Court to conclude that it is more than reasonably likely that the credible findings made in Sister's asylum application would have also been made in the Defendant's asylum application in 2011. Combined with all the factors discussed above, the Defendant would have had a reasonable likelihood of success on an asylum claim.

b. CAT protection

Article 3 of the Convention Against Torture (CAT) provides, without exception, that "[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Sen. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85; *Khouzam v. Attorney Gen. of U.S.*, 549 F.3d 235, 242 (3d Cir. 2008). In order to receive CAT protection from removal from the United States, the alien must show "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2)–(3). Thus, a claim for CAT protection carries a stricter burden of proof than a claim for asylum. "Torture," for purposes of a CAT claim, must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1) (2011). "[O]ne way a petitioner can show that a government acquiesces in torture is if it is 'willfully blind' to such activities." *Torres-Escalantes v. Attorney Gen. of U.S.*, 632 F. App'x 66, 68 (3d Cir. 2015).

The Defendant argues that he likely would have made a successful claim for CAT protection based on the violence inflicted on his family by gangs, by Cousin's attackers in Honduras, and by Sister's rapist in El Salvador. The Government argues that the evidence in the record of the circumstances that the Defendant faced in El Salvador at the time of his 2011 Removal Proceedings does not meet the definition of torture because the circumstances do not meet the "public official" requirement.

First, the Government is correct that the evidence in the record related to gang violence (and their failed attempt at recruiting Brother) occurred after the 2011 Removal Proceeding since Brother testified that the threats began in November 2011 and continued into 2013. (Def.'s Suppl. App. 259.) But it is unclear that the events related to Brother categorically would not have factored into the Defendant's CAT claim because the events are only a few months after the date of the Removal Proceeding on June 23, 2011, and even a cursory review of immigration cases demonstrates the slow pace at which they unfold. While it is also unclear how quickly the threats escalated against Brother and Brother's family (i.e., the Defendant), it is also noteworthy that Brother was granted asylum.

Second, the Government argues that any violence that Cousin and other family members faced in Honduras should also be disregarded as the Defendant must show risk of torture in the proposed country of removal, El Salvador. In response to that geographic distinction argument, the Defendant argues that the violence his family faced in Honduras supports his claim for CAT protection from removal to El Salvador because those family members, who initially sought

refuge in El Salvador, also had to flee El Salvador out of fear that their assailants from Honduras would come to El Salvador to attack them. (Def.'s Suppl. App. 5–7.) The Defendant himself testified that the dangerous men who hunted Cousin and his family had found the family while they were in hiding in El Salvador. (Tr. of Proceedings, ECF No. 31, 127:7–12.)

Although the attacks on Cousin and the murder of Cousin's brother occurred in Honduras, the record shows the threats the family faced from dangerous and determined people did not stop at the border and evidenced serious danger. (Tr. of Proceedings, ECF No. 31, 127:7–12.) To be clear, the Defendant's family straddles both sides of the El Salvador-Honduras border. Mother lived thirty minutes from that border, and the family would visit one another across the border for holidays and birthdays. (ECF No. 31, 84:17–85:11; 122:23–123:1.) If the El Salvadoran authorities are "willfully blind" to this violence spilling over into El Salvador, then the events that began in Honduras matter.

For a CAT claim, the Defendant would have to show that he more likely than not faced torture if he was returned home in 2011—a higher standard than an asylum claim—and the evidence with respect to the threats against Cousin, the threats against Cousin's family, and the murder of the Defendant's other cousin is insufficient, alone, to show a reasonable likelihood of success on this claim. While anyone in the Defendant's shoes might well be in fear of possible persecution (indeed likely sufficient fear to warrant asylum protection), there is insufficient evidence to show that those threats *alone* spilled over to create a "more likely than not" threat of torture against the

Defendant. However, the events occurred pre-2011 Removal Order, and the Defendant could have included them in any application or claim.[45]

But there is more in the record. The death threats directed specifically at Sister and Sister's family, combined with the series of events surrounding Cousin and the Defendant's other family members, constitute sufficient evidence to show a reasonable likelihood of success on a claim that the Defendant more likely than not would have faced torture had he returned to El Salvador around the time of the 2011 Removal Proceeding.

With respect to events surrounding Sister and Sister's rapist, the Government claims there is insufficient evidence in the record of Salvadoran government acquiescence. Again, according to family members' testimony, death threats stemming from Sister's rapist began in 2008 and those threats continued through 2011. (ECF No. 31, 108:2–109:23, 116:22–23.) The Government argues that the Salvadoran authorities successfully prosecuted Sister's rapist and there was insufficient evidence that the threats facing Sister in El Salvador would also apply to the Defendant. But, DHS's credible fear findings report in Sister's asylum application, as discussed above, sufficiently rebut the Government's

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[45] The credible testimony of the Defendant's witnesses and the documents in the Defendant's Supplemental Appendix establish that the Defendant's deceased cousin was killed in early 2011 and Cousin had an attempt on his life and his family members' lives who were in his house with him just prior to that time. (Def.'s Suppl. App. 47, 57, 61; *see also supra* Part II.B.4.ii.a,2.)

argument that the Defendant would not have been able to meet the "public official" requirement.

This leaves the Government's argument that the threats against Sister do not translate to a substantial risk of torture against the Defendant sufficient for a successful CAT claim. The testimony in the record demonstrates that the threats were often expressed against the family. (ECF No. 31, 94:11–20, 107:18–108:7.) This is where the events with Cousin and Cousin's deceased brother are quite relevant to the Defendant's CAT claim because the Defendant's own family had suffered the death of an individual because that individual's sibling testified in a rape trial. Members of the Defendant's own family were being gunned down because their sibling testified against someone, specifically for rape. When this evidence is combined with DHS's own findings in its credible fear report for Sister's asylum application that rape and power are often intertwined[46] and Sister's rapist had the power to effectuate revenge killing with the help of state actors,[47] the Court concludes that there is a reasonable likelihood that the Defendant would have succeeded on a claim for CAT protection. (Def.'s Suppl. App. 357–59.)

c. Withholding of removal

The second form of relief from removal at issue in this case is "withholding of removal." The withholding statute, 8 U.S.C. § 1231(b)(3)(A), states that the Attorney General "may not remove an alien to a

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[46] *Id.* ("[T]he rapist's motivation is usually not sex, but power . . . .").

[47] *Id.*

country if the Attorney General decides that the alien's life or freedom would be threatened in that country," but "such withholding is unavailable 'if the Attorney General decides that . . . the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States,' § 1231 (b)(3)(B)(ii)." *Denis v. Attorney Gen. of U.S.*, 633 F.3d 201, 213 (3d Cir. 2011). The Government argues that the Defendant's New Jersey conviction for aggravated assault would have been deemed a particularly serious crime, so he would not have been eligible for withholding.

The Court again confronts the term, "particularly serious crime." In the withholding context, an alien convicted of an aggravated felony and sentenced to an aggregate term of imprisonment of at least five (5) years is deemed to have committed a particularly serious crime. 8 C.F.R. § 1208.16(d)(3). But with lesser sentences, the Attorney General has the discretion to make such a determination. *Id.*; *Denis*, 633 F.3d at 213–14. In those cases, whether the alien committed a particularly serious crime is based on a case-by-case analysis of the particular facts and the nature of the crime. *Denis*, 633 F.3d at 214. Once again, however, this Court should not engage in such an analysis here, given Circuit precedent: "to be eligible for classification as a 'particularly serious crime,' an offense must be an aggravated felony as defined in the INA at 8 U.S.C. § 1101(a)(43)." *Alaka*, 456 F.3d at 104 (addressing "particularly serious" as that term is used in the withholding of removal statute, 8 U.S.C. § 1231(b)(3)(B)). Because the Defendant does not carry a conviction for an aggravated felony as that term is defined in the INA,

see supra Part II.B.4.ii.a.1, his conviction could not qualify under Third Circuit law as a "particularly serious crime" for purposes of the withholding of removal statute.

In an effort to circumvent this Circuit's rule in *Alaka*,[48] the Government points to case law involving a conviction under the same New Jersey criminal statute, arguing that there is a high probability that the Defendant would have been found to have committed a particularly serious crime. *See Aguilar v. Attorney Gen. of U.S.*, 665 F. App'x 184, 189 (3d Cir. 2016) (IJ determined the defendant's conviction of New Jersey's aggravated assault statute, N.J. Stat. Ann. § 2C:12-1(b)(1), for which he was sentenced to four (4) years' imprisonment, was a particularly serious crime rendering the defendant ineligible for withholding of removal). *Aguilar* referenced *Alaka* head-on in a footnote, noting that whether Aguilar's New Jersey aggravated assault conviction was an aggravated felony was not addressed by the underlying immigration decision, and neither party raised or briefed the aggravated felony issue on appeal. 665 F. App'x at 188 n.4. Our Court of Appeals, therefore, "declined to address or reevaluate *Alaka*." Without controlling Circuit or Supreme Court authority overruling or abrogating the precedential holding in *Alaka*, this Court declines the Government's invitation to sidestep *Alaka*'s rule that "an offense must be an aggravated felony in order to be classified as a 'particularly serious crime.'" 456 F.3d at 105.

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[48] *See supra* note 38 (declining to adopt the Government's argument that this Court should disregard *Alaka).*

In order to qualify for withholding of removal, the Defendant must establish that it is more likely than not that his "life or freedom would be threatened in th[e] country [of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." *Churilov v. Attorney Gen. of U.S.*, 366 F. App'x 407, 409 (3d Cir. 2010); 8 U.S.C. § 1231(b)(3)(A). The Court need not revisit its findings and conclusions that the Defendant would have been able to show a membership to a protected social group. [49] "As with asylum, [the applicant] must show that any persecution is on account of a protected ground, but in addition, she must show that such persecution is 'more likely than not' to occur." *Gomez-Zuluaga v. Attorney Gen. of U.S.*, 527 F.3d 330, 348 (3d Cir. 2008). The standard for establishing a claim of withholding of removal is higher than the standard for asylum. *Id.* But it is less stringent than the standard for a claim under CAT. The focus in a withholding analysis is the risk of persecution, and "[t]he burden of establishing a risk of future torture is more stringent than is the burden of establishing a risk of future persecution."[50] *Gelaneh v. Ashcroft*, 153 F. App'x 881, 888 (3d Cir. 2005).

Our Court of Appeals has stated that it is "hardly likely" that one could meet the standard for CAT removal yet fail to meet the standard for withholding

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[49] *See supra* Part II.B.4.ii.a.2.

[50] Torture is one such example of persecution. *Long Hao Li v. Attorney Gen. of U.S.*, 633 F.3d 136, 149 (3d Cir. 2011) ("Our oft-quoted, non-exclusive list of examples of persecution 'include[s] threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.'") (quoting *Cheng v. Attorney Gen. of U.S.*, 623 F.3d 175, 192 (3d Cir. 2010)).

if the evidence is the same under both analyses. *Id.* Therefore, in light of the standard applicable in this case (to show a reasonable likelihood of success by a preponderance of the evidence), this Court's analysis of the withholding claim parallels its analysis of the CAT claim. The evidence in the record before the Court shows a reasonable likelihood that the Defendant could have successfully shown, following his 2011 Removal Proceeding, that it was more likely than not that his life or freedom would be threatened in El Salvador. As with the CAT claim, this conclusion is based on the Court's review of the matters in the record already described above and the testimony of the Defendant's family (which the Court finds and concludes was credible). The Court concludes that the Defendant can show a reasonable likelihood of success on a withholding of removal claim pursuant to 8 U.S.C. § 1231.

d. Presumption of prejudice

Even though the Defendant meets the prejudice prong based on the reasonable likelihood of success on the asylum, CAT, or a withholding claim, the Court also concludes this is the very case contemplated in *Charleswell* where the procedural defects were so central to the 2011 Removal Proceeding's legitimacy that prejudice must be presumed. 456 F.3d at 362 n.17.[51] While our Court of Appeals has yet to address

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[51] That footnote reads:

> Here, it makes sense to require such a burden because Charleswell remains able to show, on the record, how, if at all, the result could have been different. However, as some courts have recognized, this standard is not necessarily fixed. Almost all courts that have established a prejudice standard have done so with scenarios that involved the

a case with facts showing this level of disregard for an alien's due process rights, trial courts in other Circuits have.

The District of Massachusetts confronted one such case in 2017. In *United States v. Walkes*, the defendant received a Notice of Intent to Issue a Final Administrative Removal Order (presumably the I-851). No. 15-cr-10396, 2017 WL 374466, at *1 (D. Mass. Jan. 25, 2017). That DHS officer told the defendant that he had no rights; the defendant was not allowed to see a judge; he was not given a list of organizations that could provide free legal counsel; he did not receive a copy of his forms at the end of the meeting; and he indicated on a separate form that he wished to contest his deportation. *Id.* Based on the "specific facts of this case," the district court found that prejudice would be presumed. *Id.* at *5. The *Walkes* court acknowledged that (a) the passage of time; (b) the record in front of the Court; (c) the vacating of the underlying conviction;[52] and (d) the circumstances of

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> erroneous denial, by an IJ, of some opportunity to apply for discretionary relief, such as a waiver under section 212(c). *But some procedural defects may be so central or core to a proceeding's legitimacy, that to require an alien to establish even a "reasonable likelihood" that he would have obtained a different result establishes too high a burden. See United States v. Luna*, 436 F.3d 312, 321 (1st Cir. 2006) ("There may be some cases where the agency's violations of a petitioner's rights were so flagrant, and the difficulty of proving prejudice so great that prejudice may be presumed . . . .") (internal citations and quotations omitted).

456 F.3d at 362 n.17 (emphasis added).

[52] Walkes's guilty pleas from prior state court convictions were vacated pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010) (counsel's failure to inform a client whether his plea carries a risk

an expedited removal proceeding following a criminal conviction made it more difficult for the defendant to establish that he would have found some sort of relief had the process been conducted correctly. *Id.* The *Walkes* court then noted that the deprivation of a right to appeal was "sufficiently flagrant to justify a presumption of prejudice." *Id.*

In light of the facts here, the Court reaches the same conclusion as the *Walkes* court that prejudice must be presumed based on the "sufficiently flagrant" deprivation of rights. *Id.* The record here goes beyond the facts of *Walkes*. *Id.* As explained above, any actual understanding and exercise of his rights by the Defendant was stopped dead in its tracks by the DHS Officers who steered the Defendant to waive away his rights (or did it for him) *before* providing an explanation of such rights to the Defendant.

As in *Walkes*, there are additional factors that support the conclusion that prejudice should be presumed. First, the dissembling and convoluted testimony of the DHS Officers clouded any opportunity for this Court to get an accurate idea of what actually happened in the 2011 Removal Proceeding. While the Court applied the law to the facts in the record with respect to claims for asylum, CAT, and withholding of removal and concluded that the Defendant met his burden with respect to prejudice in such regards, the lapse in time and the changes in the law since 2011 forced the Court to engage in a degree of prediction as to what an IJ at a different time would or would not have concluded on

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of deportation results in constitutionally deficient assistance of counsel). *Walkes*, 2017 WL 374466, at *2.

discretionary matters. That is all a result of the conduct of the DHS Officers here. Beyond that is the reality that the Defendant's New Jersey conviction was insufficient to warrant expedited Removal Proceedings in the first place, as that conviction is insufficient to make the Defendant an "aggravated felon" under federal law. All of this is compounded by the "sufficiently flagrant" deprivation of rights which occurred here, which alone is sufficient to presume prejudice in this case. *Walkes*, 2017 WL 374466.

"An error is fundamental if it undermines confidence in the integrity of the criminal proceeding." *Young v. United States*, 481 U.S. 787, 810 (1987). While the 2011 Removal Proceeding was not criminal in nature, "liberty itself may be at stake in such matters." *Id.*; *see also Dimaya*, 138 S. Ct. at 1209 ("[D]eportation is a particularly severe penalty, which may be of greater concern to a convicted alien than any potential jail sentence."). Therefore, even if the Defendant was unable to show prejudice by demonstrating that he had a reasonable likelihood of success on his asylum, CAT, or withholding arguments, such prejudice must be presumed in this case, given the gravity of what happened at the 2011 Removal. The Defendant satisfies the third element of § 1326(d).[53]

C. Disposition of Defendant's Motion to Dismiss

The Defendant has satisfied the three elements of § 1326(d) to collaterally attack the 2011 Removal

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[53] Of course, the Attorney General's 2018 decision in *Matter of A-B-* has no impact on this portion of the Court's Opinion in this case.

Order. Therefore, the Defendant's Motion to Dismiss Indictment is granted on the merits.

III. Defendant's Motion for Release on Bond

The Defendant's Motion for Release on Bond, ECF No. 36, is denied as moot in light of the Court's dismissal of the Indictment.

IV. Government's Motion to Dismiss

Three months after the Defendant filed his Motion to Dismiss, the Government filed its own Motion to Dismiss Indictment, ECF No. 46. The Government was willing to dismiss its own Indictment with prejudice, but it would not consent to the Court's granting of the Defendant's Motion to Dismiss. (Tr. of Proceedings, ECF No. 57, 6:18–24, 30:5–7.) The difference between the "cross" Motions to Dismiss Indictment is that the Defendant's Motion to Dismiss, now granted, attacks the validity of the underlying 2011 Removal Proceeding. The ultimate effect of granting the Defendant's Motion to Dismiss on its merits on any future removal proceedings against the Defendant is uncertain, as that issue in the first instance is for an immigration court (and perhaps ultimately the Court of Appeals). But without an adjudication of the Defendant's Motion (or the Government's concession to it), the conduct and result of the 2011 Removal Proceeding would be shielded from public examination, notwithstanding that the Government relied on that very Removal Proceeding in seeking the Defendant's Indictment. This is important since, as the Government conceded at the hearings in this case, the United States could (and may well) simply now seek to rely on the 2011 Removal Process, the fatally flawed Forms, and the resulting

2011 Removal Order in this case in future removal proceedings. (ECF No. 77, 37:23–38:12.)

In light of the Court's granting of the Defendant's Motion to Dismiss because the Defendant has successfully collaterally attacked the 2011 Removal, and in light of the facts brought before the Court by the Government itself, the Government's Motion to Dismiss is denied. Recognizing that it is unusual for a court to deny the Government's motion to dismiss an indictment that the Government sought in the first place, the Court further explains its reasoning.

A. Fed. R. Crim. P. 48(a)

The Government seeks dismissal of its own Indictment because "the United States has determined that dismissal . . . is in the interests of justice."[54] (Gov't's Mot. to Dismiss Indictment, ECF No. 46, at 1.) The Federal Rules of Criminal Procedure provide that "[t]he government may, *with leave of court*, dismiss an indictment, information, or complaint." Fed. R. Crim. P. 48(a) (emphasis added). But courts do not have "unfettered discretion" to deny

[54] But despite some substantial digging by the Court on the record, the Government never came out and said what those "interests" were, other than asserting that there was a "litigation risk" without articulating what the risk was (*see* ECF No. 57, 32:8–36:21), along with the avoidance of the expenditure of additional Government time and resources on this prosecution. (Gov't's Resp. Br. in Supp. of Gov't's Mot. to Dismiss, ECF No. 66, at 9.) The risk that the Government may not prevail, or that it would have to expend further litigation resources, are not in the Court's estimation "interests of justice," but are instead the interests of the Department of Justice were it considered to be in the position of an ordinary litigant. But, of course, it is not. *Berger v. United States*, 295 U.S. 78, 88 (1935).

such motions. *In re Richards*, 213 F.3d 773, 777 (3d Cir. 2000).

The Third Circuit's standard for when a court may refuse to dismiss an indictment under Rule 48(a) is that a court is to grant a government Rule 48(a) motion to dismiss unless such dismissal is "clearly contrary to manifest public interest." *Id.* at 787. Courts have acknowledged "that refusal to dismiss is appropriate only in the rarest of cases." *Id.* at 786. This standard functions to prevent a court from routinely substituting its judgment for that of the prosecutor. *Id.* at 788. After all, our Constitution places the principal power to prosecute in the Executive Branch, not the Judicial Branch. *See In re United States*, 345 F.3d 450, 453 (7th Cir. 2003) (granting a government's petition for mandamus following a district court's denial of a government's motion to dismiss an indictment where the defendant agreed to the government's motion to dismiss).

But our Court of Appeals has also stated that a district judge "has independent responsibilities" to protect certain rights, interests, and duties. *In re Richards*, 213 F.3d at 788. While Rule 48(a) should rarely be used to bar dismissal, a district court's role in considering a Rule 48(a) motion is not that of a rubber stamp. *Id.* The district court's exercise of its judgment, as set out in *In re Richards*, takes two forms. First, it protects a defendant from harassment such as repeated prosecution and also protects judicial processes from abuse. *Id.*; *see Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977) (per curiam). Second, "the public has a generalized interest in the processes through which prosecutors make decisions about whom to prosecute that a court can serve by inquiring

into the reasons for a requested dismissal." *Id.* at 789. "Bringing these decisions into the open may, in turn, lead to attempts by the public to influence these decisions through democratic channels." *Id.*

B. Application of Rule 48(a)

This is not a case where the Court is refusing to dismiss the case. The case will be dismissed. But it will be dismissed on the merits, as explained above, pursuant to the Defendant's Motion to Dismiss. Such a result balances the principles of *In re Richards* as it serves to limit this Defendant's exposure to future prosecutorial efforts reliant on the invalid 2011 Removal without offending the role of the Executive Branch's exercise of prosecutorial discretion and does not constitute a refusal to dismiss. In reaching this result, the Court concludes as follows.

With respect to risk of prosecutorial harassment as that term is used in this context,[55] given that further immigration proceedings (Removal Proceedings) against the Defendant lie at least initially in non-Article III tribunals or processes under the authority of the Department of Justice,[56] a dismissal with prejudice on the Government's Motion to Dismiss is insufficient to address the real risk to this Defendant

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[55] In this Court's judgment, this does not require a showing of a malicious prosecutorial motive, but is instead focused on the repeated use of prosecutorial authority in a manner that offends, for instance, core due process interests.

[56] The Office of the Chief Immigration Judge and the appellate body, the Board of Immigration Appeals, are organized within the Office for Immigration Review, an agency of the Department of Justice, and the Attorney General is responsible for appointing the Chief Immigration Judge and the members of the Board of Immigration Appeals. 8 C.F.R. §§ 1003.1, .9.

of further prosecutorial actions at the behest of, or in conjunction with, the Department of Justice, reliant on the 2011 Removal. That is important here because prior to the Defendant's Indictment in this case, on October 3, 2017, DHS issued a "Notice of Intent/Decision to Reinstate Prior Order," which provided notice of the Secretary of Homeland Security's intent to reinstate the 2011 Removal Order. (Def.'s App. 1.) Despite what has surfaced in this case before this Court, the Government (which its lawyers assert in this Court is really only the Department of Justice and no one else) has steadfastly refused to provide any assurance that the Forms, and the 2011 Removal Proceeding, will not be relied upon in future proceedings against the Defendant, and the Court may therefore conclude that they will be. (ECF No. 77, 37:23–38:12.) And the Court may fairly conclude (and does) that a principal motivation for the Government's dismissal motion is the avoidance of an adjudication relative to the validity of the process used to engineer the 2011 Removal.[57] This all brings this case squarely

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[57] "Reinstatement orders do not exist independent and separate from their prior orders of removal but are instead explicitly premised on the prior order." *Charleswell*, 456 F.3d at 352. Pursuant to 8 U.S.C. § 1231(a)(5), when a prior order of removal is reinstated, the prior order of removal is not "subject to being reopened or reviewed" at the administrative immigration level. However, of consequence here is the fact that any such reinstatement order is subject to judicial review by our Court of Appeals, which specifically includes an examination of whether the original removal order was invalidated. *Ponta-Garcia v. Attorney Gen. of U.S.*, 557 F.3d 158, 163 (3d Cir. 2009) ("While [§ 1231(a)(5)] prohibits relitigation of the merits of the original order of removal, it does not prohibit an examination of whether the original order was invalidated . . . ."). In so holding, our Court of Appeals directly referenced the decision of the First Circuit in

within the principles of *Rinaldi*, which concluded that a Rule 48(a) dismissal should not be granted when there is a taint of impropriety related to the effort to dismiss. 434 U.S. at 30. And here, there is the undeniable possibility (if not probability) that the Forms and the 2011 Removal Order will be reused, front and center, in a future proceeding conducted under the auspices of the Department of Justice. Thus, in the Court's estimation, this risk of recycling the 2011 Removal and the Forms in future proceedings (including those managed by the Department of Justice's immigration enforcement/adjudication processes) demonstrates that granting dismissal only pursuant to the Government's Motion to Dismiss would be clearly contrary to the "manifest public interest" in the integrity of our Nation's legal processes. *Id.*

The Department of Justice has also made it crystal clear that it will take no action to ensure a lawful future Removal Proceeding against the Defendant to the extent it involves another Executive Department. The Department of Justice, here, downplays its role in immigration matters or its relationship to future applications of the 2011 Removal Proceeding by invoking what it says is in effect a bureaucratic wall within the Executive Branch. While the Department of Justice has decided that it will seemingly not pursue

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Ponta-Garc[i]a v. Ashcroft, 386 F.3d 341 (1st Cir. 2004), which observed that the administrative reinstatement of a removal order that had been invalidated by a federal district court would be "problematic." *Id.* at 343. The long and the short of it is that a determination as to the validity of the 2011 Removal may be a matter of substantial consequence in regard to future proceedings involving the Defendant.

the Defendant further on this criminal charge in this Court, its lawyers, lawyers for the *United States*, have declined to affirmatively disclaim that the federal Executive Branch won't continue to fully rely on the Forms or the 2011 Removal in any upcoming Removal (or other) proceedings as to the Defendant—Forms and a process which the Court has described as "wholly unlawful." (Tr. of Proceedings, ECF No. 77, 53:4.)

For the Department of Justice to seek to treat our Nation's immigration legal system as somehow distinct and detached from that Department's critical role in it bypasses well-established law. First, as a general matter, the Attorney General takes the reins in all litigation to which the United States or an agency is a party—his is the voice of the United States in a case before this Court. *See* 28 U.S.C. § 519 ("Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party . . . ."); *see also* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General.") And in this case, as explained above, the Assistant *United States* Attorney appeared at every hearing and every oral argument in this case, buttressed by the presence of DHS Officers.

The Attorney General and the Department of Justice of course play leading roles in the determination of immigration matters.[58] The

[58] Simply by way of example, according to the Department of Justice, its Executive Office for Immigration Review "administers

Government seemingly contends that the Department of Justice is some sort of stranger to the important work of formulating federal immigration policy and leading its enforcement.[59] But for this Court to so conclude would "tax[ ] the credulity of the credulous." *Maryland v. King*, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting). As former Attorney General Alberto Gonzales and Department of Justice Senior Litigation Counsel for the Office of Immigration Litigation Patrick Glen recently explained, "the Department of Justice [has] final say in adjudicat[ing] matters of immigration policy . . . ."[60] *See* 8 U.S.C. § 1103(a), (g) (providing Attorney General determinative role as to legal issues relative to administration of immigration policy).

The Attorney General also has far-reaching powers to himself decide specific immigration cases with his powerful referral authority under 8 C.F.R. § 1003.1 (h)(l)(i) (2015), and the exercise of that power results

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the Nation's immigration court system" and "decides whether [a charged] individual is removable from the country." U.S. Dep't of Justice, *Executive Office for Immigration Review: An Agency Guide* (2017), https:// www.justice.gov/eoir/page/file/ eoir_an_agency_guide/download.

[59] The "Attorney General enjoys broad powers with respect to 'the administration and enforcement of [the INA itself] and all other laws relating to the immigration and naturalization of aliens.'" *Matter of A-B-*, 27 I. & N. Dec. at 323 (quoting *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 279 (4th Cir. 2004)).

[60] Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L. Rev. 841, 847 (2016).

in precedential that shape immigration law.[61] *See, e.g.*, *Matter of A-B-*, 27 I. & N. Dec. at 323 ("The extraordinary and pervasive role that the Attorney General plays in immigration matters is virtually unique.").[62] It has been aptly observed that, "[i]t is the Attorney General who was statutorily charged, and remains charged together with the Secretary of the [DHS], with the administration and enforcement of the immigration laws."[63]

Given these realities, it is simply incorrect for the Government's lawyers to advise this Court that they are in no position to speak on behalf of the United States as to the future conduct of this immigration case. As explained above, the 2011 Removal Proceedings as they were carried out against the Defendant were a hollow facsimile of the due process bedrock of our Nation's legal system. This is reason enough to convince the Court that resolving the case on the Government's Motion to Dismiss alone risks very real prejudice to the Defendant stemming from further legal action against the Defendant based on the Forms and the 2011 Removal. Thus, it is necessary for this Court to use its "inherent authority to ensure that *its* processes are not being abused" by actually adjudicating the Defendant's Motion to Dismiss, which collaterally attacks the validity of his 2011 Removal Order, as opposed to dismissing the case without such an adjudication. *In re Richards*, 213 F.3d at 788 (emphasis added).

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[61] *Id.* at 857 (citing *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 921–22 (9th Cir. 2006)).

[62] *See supra* note 40.

[63] *Id.* at 850 (citing 8 U.S.C. § 1103(a), (g) (2012)).

With respect to prosecutorial discretion, concerns about the judiciary's intrusion into such discretion are not an issue here. The effect of denying a prosecutor's motion to dismiss an indictment typically results in a conundrum in which the Judicial Branch is forcing the Executive Branch's hand in matters that are nearly exclusively within the Executive's power. *See In re United States*, 345 F.3d at 453–54. That is not the case here. The issue before the Court on these cross Motions is not whether this case would be dismissed. It certainly will be. The issue facing the Court is whether the case is to be dismissed pursuant to the Defendant's Motion or the Government's.

The Court is also unconvinced that granting the Government's bald Motion to Dismiss would serve "either the public interest in the fair administration of criminal justice or [act] to preserve the integrity of the courts." *United States v. Omni Consortium*, 525 F. Supp. 2d 808, 810 (W.D. Tex. 2007). As noted above, the testimony provided in this Court by the Government's witnesses (who are federal officers) was at best nonsensical and at worst based in some material part on self-serving falsity. Based on the representations of the Government, the Court has no confidence that the 2011 "process" (including the "waivers" allegedly reflected on the Forms) will not simply be recycled and used as the starting point for the Defendant's Removal now, on the premise that the 2011 process had been legitimately conducted. And the Government's dismissal motion did not arrive until it was evident that the 2011 Removal, upon which the Government relied to make its case here, was fatally flawed. Statements by the Government "have significant consequences for the public's

perception of judicial proceedings. And activity that threatens the perception of fairness in those proceedings undermines faith in our system of justice." *United States v. Kpodi*, No. 17-3008, 2018 U.S. App. LEXIS 10720, at *15 (D.C. Cir. Apr. 27, 2018). As this Court has concluded, the Defendant was upon Indictment forced to litigate (now successfully) a collateral attack on the validity of his removal under § 1326(d), and the invalidity of that proceeding has been demonstrated. It is not "whether the decision to maintain the federal prosecution was made in bad faith" that guides this Court's decision to deny the Government's Motion to Dismiss. *Rinaldi*, 434 U.S. at 30. It is instead the Government's efforts to now terminate this prosecution at this "cross Motion to Dismiss" stage without any adjudication on the merits of the § 1326(d) defense that the Court concludes necessitates this outcome. *Id.* It simply is not in the public interest to permit the Government to now avoid such adjudication because it was required to confront the reality of the evidence it had advanced.

Beyond that is the reality that although the Government has formally advised the Court that it does not adopt nor rely on its own witnesses' testimony in this Court, the Government nevertheless has not affirmatively disavowed it. The factual findings and resulting conclusions in this Opinion should not be surprising. The Court went to great lengths to lay out what it viewed as the apparent fallacies, inconsistencies, and inaccuracies of the Officers' testimony during the course of the hearings in this case. After learning that the Government would not rely on that testimony, the Court asked the Government (at the final hearing in this case) if the

Court should believe the Officers' testimony. The Government's lawyer responded, "Your Honor, you should give it as much weight as you see fit." (Tr. of Proceedings, ECF No. 77, 27:21–22.) Thus, the Government neither vouches for the testimony of the federal agents it called as witnesses nor does it acknowledge the facial flaws in it.

Of course, our Court of Appeals has rejected the principle of the Government taking such a noncommittal position as to the credibility of its own witnesses:

> We do not believe, however, that the prosecution's duty to disclose false testimony by one of its witnesses is to be narrowly and technically limited to those situations where the prosecutor knows that the witness is guilty of the crime of perjury. Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading. This is not to say that the prosecutor must play the role of defense counsel, and ferret out ambiguities in his witness' responses on cross-examination. **However, when it should be obvious to the Government that the witness' answer, although made in good faith, is untrue, the Government's obligation to correct that statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury.**

United States v. Harris, 498 F.2d 1164, 1169 (3d Cir. 1974) (emphasis added). The Government's non-position as to the credibility of the testimony of the only witnesses it called in support of this prosecution gives the Court no basis to conclude that the Government will not re-use the 2011 Removal against the Defendant at the next opportunity if its validity is not adjudicated one way or the other, here and now.

As a final note, the timing of the cross Motions to Dismiss is also not the issue here. While it is true that the Government's Motion to Dismiss became fully briefed a few weeks before the Defendant's previously filed Motion to Dismiss was fully briefed, the delay in the briefing schedule for the Defendant's Motion to Dismiss was a direct result of the timing of the Government's production of documents to the Defendant. It also bears noting that the most telling physical evidence that the Forms were invalid stems from the *color* copies of the Forms, which were not produced to the Defendants until March 12, 2018, two months after the Defendant filed its Motion to Dismiss and over four months after the Government filed its Indictment. (Receipt for Local Rule 16.1 Material Suppl., ECF No. 61.) Asylum-related documents key to the Defendant's case regarding prejudice were also not provided until March 12, 2018. (Receipts for Local Rule 16.1 Material Suppl., ECF Nos. 59, 60, 61, 62.) In fact, this Court modified the briefing schedule on Defendant's Motion to Dismiss five (5) times to allow sufficient time for the Government to produce necessary and previously requested documents to the Defendant. (Orders, ECF Nos. 30, 33, 35, 39, 51.) Further adding to this delay, after the fourth extension, the Government instructed DHS to cease

document production and redaction when it filed its own Motion to Dismiss. (*See* Tr. of Proceedings, ECF No. 58, 79:14–79:20.)

It struck the Court as appropriate to wait until the briefing of the previously filed Defendant's Motion had been completed before ruling on the cross Motions to Dismiss. Indeed, the Government reported to this Court *after* it filed its own Motion to Dismiss that it still was "interested in providing supplemental briefing" on the issue of prejudice as it pertained to the Defendant's Motion to Dismiss. (Tr. of Proceedings, ECF No. 57, 30:20–31:1.) Allowing the Defendant's Motion to Dismiss to complete its briefing schedule and for the Court to rule on the Motions at the same time was both necessary and appropriate to the Court's obligations to fully consider the Government's stated reasons for its dismissal motion, in light of the testimony of the DHS Officers during these proceedings.

C. The Government's Motion to Dismiss Indictment is Denied

The Government's Motion to Dismiss is denied. "Procedural fairness and regularity are of the indispensable essence of liberty." *Mounts v. Boles*, 326 F.2d 186, 188 (4th Cir. 1963) (quoting *Shaughnessy*, 345 U.S. at 224 (Black, J., dissenting)). Whether the Defendant will be subject to new proceedings aimed at now effectuating his removal from the United States in conformity with the law is a matter in the next instance for the administrative immigration process, with judicial review of those proceedings at the United States Court of Appeals. But it is this Court's obligation to rule on the competing dismissal motions

on the record that is now before it. As "justice must satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14 (1954), this Court concludes that the facts and the law direct that this case be dismissed on the merits, and not based simply on the post-indictment, post-testimony exercise of the Government's prosecution prerogatives.

V. Conclusion

For these reasons, the Defendant's Motion to Dismiss Indictment, ECF No. 14, is granted.

The Defendant's Motion for Bond, ECF No. 36, is denied without prejudice as moot. The Government's Motion to Dismiss Indictment, ECF No. 46, is denied.

An appropriate Order will issue.

Mark R. Hornak
Mark R. Hornak
United States District Judge

cc: All counsel of record

Exhibit
A

U.S. Department of Homeland Security

Notice of Rights and Request for Disposition

Subject ID : [redacted] Event No: [redacted]
FINS #: [redacted] File No: [redacted]

Name: Mario REYES (AKA: REYES, MARIO)

NOTICE OF RIGHTS

You have been arrested because immigration officers believe that you are illegally in the United States. You have the right to a hearing before the Immigration Court to determine whether you may remain in the United States. If you request a hearing, you may be detained in custody or you may be eligible to be released on bond, until your hearing date. In the alternative, you may request to return to your country as soon as possible, without a hearing.

You have the right to contact an attorney or other legal representative to represent you at your hearings, or to answer any questions regarding your legal rights in the United States. Upon your request, the officer who gave you this notice will provide you with a list of legal organizations that may represent you for free or for a small fee. You have the right to communicate with the consular or diplomatic officer from your country. You may use a telephone to call a lawyer, other legal representative, or consular officer at any time prior to your departure from the United States.

REQUEST FOR DISPOSITION

Initials ☒ I request a hearing before the Immigration Court to determine whether or not I may remain in the United States.

Initials ☐ I believe I face harm if I return to my country. My case will be referred to the Immigration Court for a hearing.

Initials ☒ I admit that I am in the United States illegally, and I believe that I do not face harm if I return to my country. I give up my right to a hearing before the Immigration Court. I wish to return to my country as soon as arrangements can be made to effect my departure. I understand that I may be held in detention until my departure.

Mario [redacted]
Signature of Subject

6-23-11
Date

CERTIFICATION OF SERVICE

☒ Notice read by subject.

☒ Notice read to subject by JOSE ALCOTA, in the SPANISH language.

T. DARTI SDO
Name of Officer (Print)

JOSE ALCOTA, SIDA
Name of Interpreter (Print)

[redacted]
Signature of Officer

6-23-11 9 PM
Date and Time of Service

Form I-826 (Rev. 08/01/07)

Exhibit
B

Notice of Intent to Issue a Final Administrative Removal Order

In removal proceedings under section 238(b) of the Immigration and Nationality Act

Event No: [redacted]
File Number [redacted]

To: Mario REYES AKA: REYES, MARIO

Address: CRAF STATE PRISON TRENTON MERCER NJ UNITED STATES
(Number, Street, City, State and ZIP Code)

Telephone:
(Area Code and Phone Number)

Pursuant to section 238(b) of the Immigration and Nationality Act (Act) as amended, 8 U.S.C. 1228(b), the Department of Homeland Security (Department) has determined that you are amenable to administrative removal proceedings. The determination is based on the following allegations:

1. You are not a citizen or national of the United States.
2. You are a native of EL SALVADOR and a citizen of EL SALVADOR
3. You entered the United States (at)(near) Unknown place on or about Unknown date
4. At that time you entered Unknown Place
5. You are not lawfully admitted for permanent residence.
6. You were, on December 11th, 2009, convicted in the New Jersey Superior Court Hudson County for the offense of Aggravated Assault in violation of N.J.S.A. 2C:12-1b(1) for which the term of imprisonment imposed was 3 years

Charge:
You are deportable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii), as amended, because you have been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act, 8 U.S.C. 1101(a)(43)(F).

Based upon section 238(b) of the Act, 8 U.S.C. 1228(b), the Department is serving upon you this NOTICE OF INTENT TO ISSUE A FINAL ADMINISTRATIVE REMOVAL ORDER ("Notice of Intent") without a hearing before an Immigration Judge.

Your Rights and Responsibilities:
You may be represented (at no expense to the United States government) by counsel, authorized to practice in this proceeding. If you wish legal advice and cannot afford it, you may contact legal counsel from the list of available free legal services provided to you.

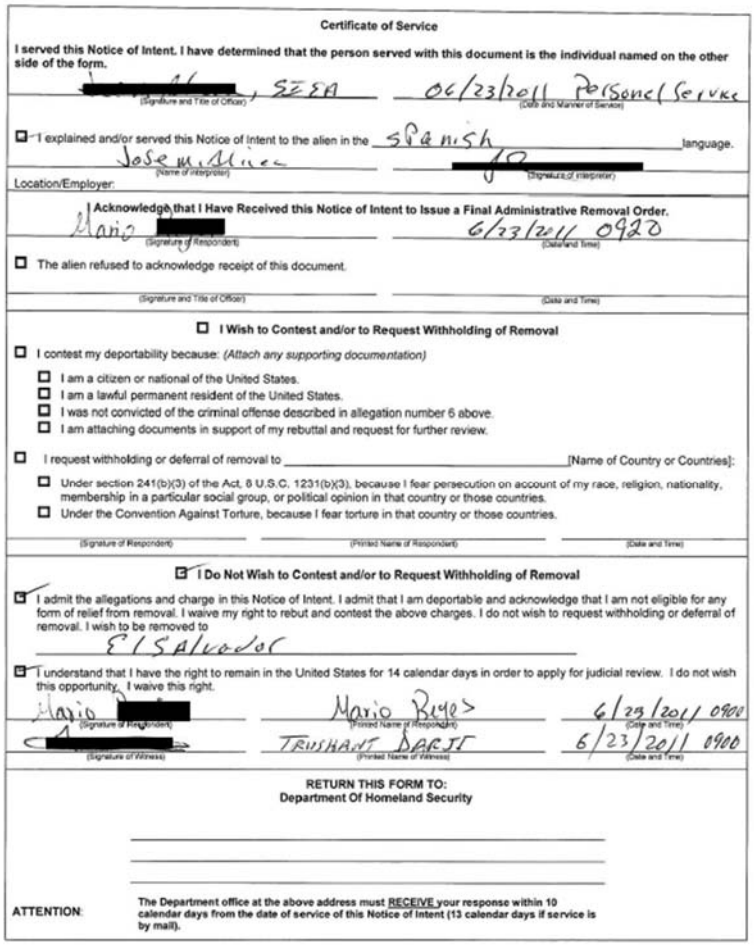
You must respond to the above charges in writing to the Department address provided on the other side of this form within 10 calendar days of service of this notice (or 13 calendar days if service is by mail). **The Department must RECEIVE your response within that time period.**

In your response you may: request, for good cause, an extension of time; rebut the charges stated above (with supporting evidence); request an opportunity to review the government's evidence; admit deportability; designate the country to which you choose to be removed in the event that a final order of removal is issued (which designation the Department will honor only to the extent permitted under section 241of the Act, 8 U.S.C. 1231); and/or, if you fear persecution in any specific country or countries on account of race, religion, nationality, membership in a particular social group, or political opinion or, if you fear torture in any specific country or countries, you may request withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), or withholding/deferral of removal under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture). A grant of withholding or deferral of removal would prohibit your return to a country or countries where you would be persecuted or tortured, but would not prevent your removal to a safe third country.

You have the right to remain in the United States for 14 calendar days so that you may file a petition for review of this order to the appropriate U.S. Circuit Court of Appeals as provided for in section 242 of the Act, 8 U.S.C. 1252. You may waive your right to remain in the United States for this 14-day period. If you do not file a petition for review within this 14-day period, you will still be allowed to file a petition from outside of the United States so long as that petition is filed with the appropriate U.S. Circuit Court of Appeals within 30 calendar days of the date of your final order of removal.

[redacted] SDO — Martha NJ — 6/27/2011 10:00
(Signature and Title of Issuing Officer) (City and State of Issuance) (Date and Time)

Form I-851 (Rev. 08/01/07)



Certificate of Service

I served this Notice of Intent. I have determined that the person served with this document is the individual named on the other side of the form.

[redacted], SEA — 06/23/2011 Personal Service
(Signature and Title of Officer) — (Date and Manner of Service)

☐ I explained and/or served this Notice of Intent to the alien in the Spanish language.

Jose M. Alicea — [redacted]
(Name of Interpreter) — (Signature of Interpreter)

Location/Employer:

I Acknowledge that I Have Received this Notice of Intent to Issue a Final Administrative Removal Order.

Mario [redacted] — 6/23/2011 0920
(Signature of Respondent) — (Date and Time)

☐ The alien refused to acknowledge receipt of this document.

(Signature and Title of Officer) — (Date and Time)

☐ **I Wish to Contest and/or to Request Withholding of Removal**

☐ I contest my deportability because: *(Attach any supporting documentation)*

- ☐ I am a citizen or national of the United States.
- ☐ I am a lawful permanent resident of the United States.
- ☐ I was not convicted of the criminal offense described in allegation number 6 above.
- ☐ I am attaching documents in support of my rebuttal and request for further review.

☐ I request withholding or deferral of removal to _____ [Name of Country or Countries]:

- ☐ Under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), because I fear persecution on account of my race, religion, nationality, membership in a particular social group, or political opinion in that country or those countries.
- ☐ Under the Convention Against Torture, because I fear torture in that country or those countries.

(Signature of Respondent) — (Printed Name of Respondent) — (Date and Time)

☑ **I Do Not Wish to Contest and/or to Request Withholding of Removal**

☑ I admit the allegations and charge in this Notice of Intent. I admit that I am deportable and acknowledge that I am not eligible for any form of relief from removal. I waive my right to rebut and contest the above charges. I do not wish to request withholding or deferral of removal. I wish to be removed to

El Salvador

☑ I understand that I have the right to remain in the United States for 14 calendar days in order to apply for judicial review. I do not wish this opportunity. I waive this right.

Mario [redacted] — Mario Biggs — 6/23/2011 0900
(Signature of Respondent) — (Printed Name of Respondent) — (Date and Time)

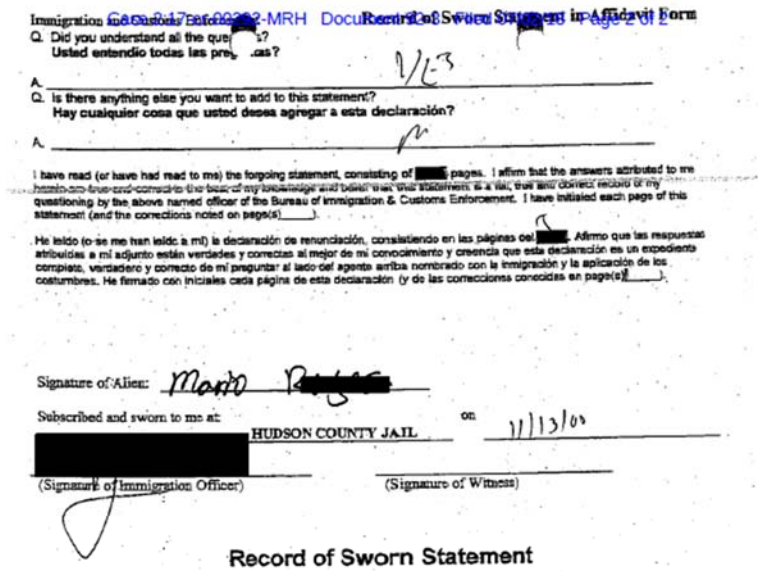
[redacted] — TRUSHANT BARJI — 6/23/2011 0900
(Signature of Witness) — (Printed Name of Witness) — (Date and Time)

RETURN THIS FORM TO:
Department Of Homeland Security

ATTENTION: **The Department office at the above address must RECEIVE your response within 10 calendar days from the date of service of this Notice of Intent (13 calendar days if service is by mail).**

Form I-851 (Rev. 08/01/07)

Exhibit
C



Immigration and Customs Enforcement — Record of Sworn Statement in Affidavit Form

Q. Did you understand all the questions?
Usted entendio todas las preguntas?

A. V/E3

Q. Is there anything else you want to add to this statement?
Hay cualquier cosa que usted desea agregar a esta declaración?

A. N

I have read (or have had read to me) the forgoing statement, consisting of [redacted] pages. I affirm that the answers attributed to me herein are true and correct to the best of my knowledge and belief; that this statement is a full, true and correct record of my questioning by the above named officer of the Bureau of Immigration & Customs Enforcement. I have initialed each page of this statement (and the corrections noted on page(s)_____).

He leído (o se me han leído a mí) la declaración de renunciación, consistiendo en las páginas del [redacted]. Afirmo que las respuestas atribuídas a mí adjunto están verdades y correctas al mejor de mi conocimiento y creencia que esta declaración es un expediente completo, verdadero y correcto de mi preguntar al lado del agente arriba nombrado con la inmigración y la aplicación de los costumbres. He firmado con iniciales cada página de esta declaración (y de las correcciones conocidas en page(s)_____).

Signature of Alien: Mario [redacted]

Subscribed and sworn to me at: [redacted] HUDSON COUNTY JAIL on 11/13/09

(Signature of Immigration Officer) (Signature of Witness)

Record of Sworn Statement
Expediente de la declaración jurada

INITIALS OF SUBJECT: M.R 5 INITIAL OF AGENT: R

Form I-215C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	2:17-cr-292
MARIO NELSON REYES-ROMERO,	)	
	)	
Defendant.	)	
	)	

ORDER

AND NOW, this 2nd day of July, 2018, for the reasons stated in this Court's Opinion of this date, it is hereby ORDERED that:

1. The Defendant's Motion to Dismiss Indictment, ECF No. 14, is granted.
2. The Defendant's Motion for Bond, ECF No. 36, is denied without prejudice as moot.
3. The Government's Motion to Dismiss Indictment, ECF No. 46, is denied.

It is ORDERED that the Indictment of Mario Nelson Reyes-Romero, ECF No. 1, is hereby dismissed with prejudice.

/s/ Mark R. Hornak
Mark R. Hornak
United States District Judge

cc: all counsel of record

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1923

UNITED STATES OF AMERICA,
Appellant

v.

MARIO NELSON REYES-ROMERO

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2:17-cr-00292-001)
Chief District Judge: Mark R. Hornak

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, *Circuit Judges*

The petition for rehearing filed by Appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court

and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Date: June 26, 2020
Lmr/cc: Donovan J. Cocas
Laura S. Irwin
Adrian N. Roe