IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 00-2238, 00-2239

UNITED STATES,
Appellant & Cross-Appellee

v.

JAMES M. KNOTT, SR.; RIVERDALE MILLS CORP.,
Defendants, Appellees, and Cross-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS APPELLANT

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STATEMENT OF JURISDICTION

This is a criminal case initiated by Grand Jury indictment. The district court had jurisdiction under 18 U.S.C. § 3231. On July 27, 2000, after the United States voluntarily dismissed the indictment, the district court issued an order granting the defendants' joint motion for attorneys fees and litigation expenses as to defendant Riverdale Mills Corp., but denying the motion as to defendant James M. Knott, Sr.. CR 50, JA 8.[1] The United States filed a timely notice of appeal on August 25, 2000. CR 79, JA 29. The defendants filed a timely notice of appeal on August 31, 2000. CR 80, JA 30. This Court has jurisdiction over the final decision of the district court, under 28 U.S.C. § 1291.

[1]Citations to the record are to the district court record ("CR") number and the Joint Appendix ("JA") tab number. Citations to "Add." are to the addenda this brief.

STATEMENT OF THE ISSUES

Under the Hyde Amendment, Pub. L. No. 105-119, 111 Stat. 2440, 2519 (1997) (reprinted in the historical and statutory notes to 18 U.S.C. § 3006A) (attached at Add. 3), defendants who prevail in federal criminal cases may recover attorneys fees and litigation expenses upon a showing that the "position of the United States was vexatious, frivolous, or in bad faith." The issues in this case are:

1. Whether the district court erred in finding the Government's position to be "vexatious" without finding that prosecutors acted maliciously or with improper motive;
2. Whether the district court clearly erred in holding that there was no credible evidence to support the charges against the defendants; and
3. Whether the district court abused its discretion in citing, as evidence of vexatiousness: (a) the Government's issuance of press releases announcing the indictment; (b) the Government's alleged violation of a local discovery rule; and (c) the Government's alleged harassment of defendants during the routine execution of a search warrant.

STATEMENT OF THE CASE

A. Nature of the Case

This case involves an application under the Hyde Amendment, Pub. L. No. 105-119, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes) (attached at Add. 3), by defendants James M. Knott, Sr., (hereinafter: "Knott") and Riverdale Mills Corporation (hereinafter: "Riverdale Mills"), in which the defendants seek the recovery of attorneys fees and litigation expenses that they incurred in response to an indictment that was voluntarily dismissed by the United States before trial. In a memorandum and order issued on July 27, 2000, the district court granted fees and expenses to Riverdale Mills, but denied an award to Knott. CR 77, Add. 1. The parties filed cross appeals.

B. Course of Proceedings

The indictment in this case was returned by a grand jury in the District of Massachusetts on August 12, 1998. CR 1, JA 2. The indictment charged Riverdale Mills and Knott with two counts of knowingly violating the Federal Water Pollution Control Act (commonly known as the "Clean Water Act"), 33 U.S.C. § 1319(c)(2)(a), by discharging industrial wastewater to publicly owned treatment works ("POTW") in violation of a national pretreatment standard prohibiting the discharge of industrial wastes with a pH below 5.0 standard units

("s.u."). Ibid. Count one charged a violation on or about October 21, 1997, the date of a civil inspection by the Environmental Protection Agency ("EPA") at Riverdale Mills' manufacturing facility in Northbridge, Massachusetts. Id. at 6. Count two charged a violation on or about November 7, 1997, the date that a criminal search warrant was executed at the same facility. Ibid.

On October 14, 1998, the defendants filed a motion to suppress evidence obtained by the United States during the above civil inspection and two subsequent criminal searches. CR 8. An evidentiary hearing on the motion to suppress was held on February 5, 1999. CR 26 (clerk's notes); CR 44, JA 5 (transcript). On February 16, 1999, the district court granted the motion in part. CR 29, Add. 2, at 10. The district court ruled that EPA civil inspectors had exceeded the scope of consent granted by Knott during certain sampling activities on October 21, 1997 and that the results of such sampling should be suppressed. Id. at 5-8. However, the court ruled that evidence obtained through the execution of the subsequent criminal search warrants need not be suppressed – despite the fact that criminal agents had obtained the warrants in reliance on sampling results from the civil inspection – because the criminal agents relied on such evidence in good faith. Id. at 9-10.

After receiving the district court's order on the motion to suppress, federal prosecutors re-evaluated the evidence in the case. Although evidence to support the indictment (and particularly Count two) remained, prosecutors determined that the best evidence of violations (evidence from the civil inspection) had been suppressed. On April 23, 1999, prosecutors sought leave of court, under Fed. R. Crim. P. 48(a), to dismiss the indictment.[2] CR 50, JA 8. The motion stated that "in preparing for trial," the United States determined "that the evidence to support the counts of the indictment is insufficient to sustain the government's burden of proof." Ibid. On May 6, 1999, the district court granted leave to dismiss and the dismissal was entered. Ibid. Thereafter, defendants Knott and Riverdale Mills filed an application for attorneys fees and litigation expenses. CR 51, JA 9.

Because there was no trial on the merits of the case, the only evidence formally of record and before the district court was evidence presented at the suppression hearing. The defendants proffered additional evidence and exhibits in their Hyde Amendment application. CR 52, JA 10-21. The United States likewise proffered evidence and exhibits in its response. CR 68, JA 23-27.

[2]Prosecutors filed a motion for reconsideration of the suppression ruling, which was pending at the time prosecutors sought leave to dismiss. CR 49.

C. Disposition Below

The district court issued a memorandum and order on the Hyde Amendment application, without hearing argument or holding an evidentiary hearing. CR 77, Add. 1 (published at 106 F.Supp.2d 174). In its ruling, the district court stated that, although the prosecution in this case was "not provably frivolous or in bad faith," it was "clearly vexatious." Id. at 14. Consequently, the court ordered the United States to pay $68,726 in fees and expenses to Riverdale Mills. Id. at 16-17. The district court declined to award fees and expenses to Knott,[3] after finding that Knott's net worth exceeded eligibility limits in the Equal Access to Justice Act or "EAJA," which are incorporated by reference into the Hyde Amendment. Id. at 7-10.

D. Applicable Clean Water Act Provisions

Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." See 33 U.S.C. § 1251. To meet these objectives, Congress imposed restrictions on the direct discharge of pollutants to waters of the United States, see 33 U.S.C. § 1311, and

[3]Riverdale Mills and Knott were represented by the same counsel and incurred fees and expenses jointly. The district court reduced the requested compensation by roughly one half, in light of Knott's ineligibility. Add. 1 at 14-15.

the indirect discharge of pollutants, through municipal sewer systems or other "publicly owned treatment works" ("POTWs"). See 33 U.S.C. § 1317(b)(1). With respect to indirect discharges, the Clean Water Act requires the EPA to establish national pretreatment standards to prevent the discharge of pollutants that are "not susceptible" to treatment in or would interfere with the operation of POTWs. Ibid. These standards supplement any restrictions imposed in state or municipal sewer regulations. See 33 U.S.C. § 1317(b)(4). Because highly acidic wastewater can cause structural damage to sewer lines and otherwise interfere with POTW operations, the EPA has established a national pretreatment standard prohibiting the discharge of wastewater with a pH below 5.0. 40 C.F.R. § 403.5(b)(2). Any person who "knowingly" discharges a pollutant to a POTW in violation of a national pretreatment standard is subject to felony prosecution. See 33 U.S.C. § 1319(c)(2)(A).

STATEMENT OF FACTS

A. Background

Defendant Riverdale Mills operates a production facility in Northbridge, Massachusetts, which manufactures plastic-coated steel wire mesh for lobster pots,

fences, and other applications. CR 52 (Exh. F), JA 16 at 4. Defendant Knott is the company's principal owner and operator. Id., at 3.

The production process at the Northbridge facility includes the galvanizing and coating of steel wire. In the galvanizing process, Riverdale Mills uses hydrochloric acid and generates an acidic waste water, with a pH often below 2.0 standard units. CR 52 (Exh. C), JA 13 at 2. In the coating process, Riverdale Mills uses an alkaline wash and generates a caustic waste water with a pH often above 12.0 standard units. Ibid. Riverdale Mills discharges both types of waste into the public sewer owned by the Town of Northbridge. CR 68 (Exh. 2), JA 25 at 4-5.

In 1986, on behalf of Riverdale Mills, Knott signed and filed a certified application with the Massachusetts Department of Environmental Quality Engineering (predecessor to the Massachusetts Department of Environmental Protection) for a permit to discharge these industrial wastes into the Town of Northbridge public sewer. CR 16, JA 3 at 1-2, 8. The application estimated that the company would discharge up to 57,600 gallons of industrial-process waste per day, id. at 9, 19, and stated that the company would operate a pretreatment system, to blend and treat the acidic and caustic rinse waters before discharge. Id. at 17-18. The application stated that the "blended rinse waters [would] always be

significantly acid" – or around "4.4 S.U" – "under normal operating conditions" and that the company would add caustic soda "under automatic control" to raise the pH and maintain a pH level between 5.5 and 9.0 s.u..[4] Id. at 2, 18. The permit was granted upon several conditions, including the condition that all discharges "shall be consistent with the . . . approved plans and specifications." Id., at 12.

B. Civil Investigation

1. Initial Complaint

In late summer, 1997, the EPA in Boston received an anonymous letter from a person identifying himself (or herself) as a current maintenance mechanic and former wastewater treatment operator at Riverdale Mills. CR 68 (Exh. 1), JA 24. The letter stated that Riverdale Mills had stopped operating and maintaining its wastewater treatment system, including the monitoring of pH levels, as of March 1997. Ibid. The letter also stated that the plant was likely operating in violation of permit limits, and urged the EPA to "help . . . get the plant back into compliance." Ibid.

[4]Town of Northbridge municipal sewer regulations prohibit the discharge of industrial waste with a pH below 5.5, and, under certain circumstances, wastes with a pH above 9.5. CR 16, JA 3 at 2, 27-29.

2. Sampling on October 21, 1997

On October 21, 1997, two EPA civil inspectors, Justin Pimpare and Daniel Granz, went to Riverdale Mills for an unannounced inspection. Before conducting the inspection, the inspectors met with Knott and other Riverdale Mills employees and explained the purpose of their visit. CR 44, JA 5 at 14-17 (Pimpare), 123-124 (Granz). Among other things, the inspectors stated that they wished to inspect the facility, conduct wastewater sampling, and possibly install a 24-hour composite sampler (a machine that automatically withdraws samples at set intervals over the course of 24 hours) to monitor the facility's discharge. Ibid.

Knott consented to the inspection and sampling, including the installation of a 24-hour composite sampler. Id. at 165, 188-189 (Knott). In the suppression hearing, the parties disagreed as to whether Knott imposed specific conditions on this consent. According to the EPA inspectors, Knott imposed no conditions. Id. at 15, 24 (Pimpare); 129 (Granz). Knott testified that he told the inspectors that they had to be "accompanied at all times" so that someone from the facility could "see exactly what they see." Id. at 166-7, 189. However, Knott conceded that he did not specifically tell the inspectors that they could not sample unless Riverdale Mills personnel were present. Id. at 188.

Following the inspectors' introductory meeting with Knott and other Riverdale employees, the inspectors asked Knott to show them where they could conduct sampling. Knott led them to a manhole outside the building on Riverdale Street, (hereinafter: "manhole #1"), where an effluent discharge pipe from the production lines joined the sewer pipe under Riverdale Street. Id. at 17, 19. The inspectors opened the manhole and observed virtually no flow. When asked when there would be a discharge, Knott replied that the treatment system discharged in intermittent batches and that it could be "today . . . tomorrow . . . next week." Id. at 21 (Pimpare), 171 (Knott).

Shortly thereafter, the inspectors observed the beginning of a steady discharge. At around 10:43 a.m., in Knott's presence, the inspectors obtained a sample from the manhole and measured the sample with a pH meter. CR 52 (Exh. A), JA 11at 5. The meter recorded an extremely high pH of 12.36. Id., CR 44, JA 5 at 22. Around 11:00 a.m., the flow stopped. CR 44, JA 5 at 137; CR 52 (Exh. 2), JA 12 at 2. Thereafter, the inspectors obtained a sample of residual material remaining in the pipe. This sample was measured at 7.54 pH, showing a return toward neutral. Ibid. Given the intermittent and variable nature of the discharges, the inspectors realized that a 24-hour composite sampler could not be used to accurately measure the discharge. CR 44, JA 5 at 23. Consequently, they

informed Knott that they would have to conduct periodic sampling at the manhole throughout the day. Ibid. At this point, the sampling activity stopped and Knott led the inspectors in a tour of the facility. Id. at 24.

Shortly after noon, there was a break in the tour and the EPA inspectors returned outside to the manhole to resume sampling. Pimpare testified that he advised Knott, when the tour broke, that he and Granz were going back out to manhole #1 to conduct sampling, and that a Riverdale Mills employee, Brian Benoit, accompanied them to the manhole. Id. at 27-8. Benoit, however, testified that he did not go to the manhole when the tour broke. Id. at 194. Knott testified that he was unaware of the sampling. Id. at 175.

EPA inspectors parked a government van at the manhole and conducted the sampling activity in the open, in clear view of workers inside the building and workers entering and exiting the building entrance. Id. at 19-20, 28, 55, 186-7; JA 6 at 1-2 (photos). The inspectors took fourteen samples between 12:40 p.m. and 1:15 p.m.. CR 68 (Exh. 2), JA 25 at 6 (EPA report); CR 52 (Exh. B), JA 12 at 5-6 (Granz log). Measurements recorded by pH meter showed that 13 of the 14 samples had extremely low pH readings (between 2.19 and 2.59). Ibid. Each whole unit of pH represents a difference in acid level of ten; *e.g.*: material with a

pH of 4.0 is ten times more acidic than material with a pH of 5.0, while material with a pH of 3.0 is one hundred times more acidic than material with a pH of 5.0.

After taking their own brief lunch break, the EPA inspectors returned to manhole #1 and took one more sample, which measured around 2, when tested with pH paper. Id. at 33; CR 68 (Exh. 3), JA 26 at 1. The inspectors then reported to the Riverdale Mills office and their tour of the facility resumed. CR 44, JA 5 at 33. Knott did not accompany the inspectors on this portion of the tour but other company representatives were present. Around 3:00 p.m., at the completion of the tour, the EPA inspectors went back out to the manhole, with Riverdale Mills employee Benoit. Id. at 34, 126-7. Pimpare gave Benoit a split sample, from a sample taken during the earlier afternoon sampling. Ibid. Benoit signed a chain-of-custody form, which stated that this split sample was taken at 1:02 p.m. (*i.e.*, during the early-afternoon sampling). Id. at 35; CR 17, JA 4 at 8. While Pimpare was relinquishing this sample to Benoit, Granz reached into the manhole and took two more samples. CR 44, JA 5 at 128. Using a pH meter, Granz measured readings of 2.73 (at 3:02 p.m.) and 3.96 (at 3:03 p.m.). CR 52 (Exh. B), JA 12 at 9, CR 68 (Exh. 2), JA 25 at 6. Pimpare, Granz, and Benoit then went back inside to join Knott and other Riverdale Mills employees for a "closing conference." CR 44, JA 5 at 36, 128.

At the closing conference, the EPA inspectors advised Knott about the low pH readings they had recorded in the afternoon, told him that such discharges were in violation of national standards, and told him that the violations were a "serious concern." Id. at 36, 128. Knott replied by asking, "What does it matter what I put into the sewer system?" Id. at 36, 192. According to Knott, any low pH wastewater from Riverdale Mills would be neutralized by sanitary and laundry wastes before it reached the municipal treatment plant. Ibid. Knott also stated that he owned the portion of Riverdale Street – and the sewer line under the street – into which he was discharging. Id. at 37. In its application for a sewer-system permit (above), Riverdale Mills identified the sewer line under Riverdale Street as the "municipal sewer." CR 16, JA 3 at 21. It is the understanding of the United States that the Town of Northbridge installed this sewer line. CR 20 at 4, n. 2.

After leaving the closing conference, the EPA inspectors stopped at a manhole ("manhole #2") further down Riverdale street, (CR 68 (Exh. 2), JA 25 at 6), which Knott had identified, during the inspection, as the manhole where his "private" sewer line joined the municipal line. CR 44, JA 5 at 37. The inspectors noted that a sanitary line flowing from a residential part of Northbridge also discharged into this manhole, approximately seven feet below the line from

Riverdale Mills. CR 52 (Exh. B), JA 12 at 10, CR 68 (Exh. 2), JA 25 at 6. The inspectors used pH paper to measure the various wastes present. Ibid. Granz recorded a pH of around 7 for wastewater flowing from the residential sanitary line; a pH of around 7 for water standing in a trough at the bottom of the manhole, and a pH of around 4 for a discharge flowing through the pipe from Riverdale Mills. Id.; CR 68 (Exh. 3), JA 26 at 1. In Granz's field log, the number "4" appears to have been written over a number "7." CR 52 (Exh. B), JA 12 at 10. At the suppression hearing, Granz was unable to recall the exact circumstances prompting this over-writing, but testified that he believed he may have initially confused the readings from the sanitary and process lines. CR 44, JA 5 at 152.

3. Conditions of Treatment System on October 21, 1997

During their guided tour of the Riverdale Mills facility, the EPA inspectors observed that, consistent with the anonymous employee complaint and contrary to the terms of its sewer-system permit, Riverdale Mills was not treating the galvanizing-process wastewater or the coating-process wastewater before discharging these wastes to the sewer line. CR 68 (Exh. 2), JA 25 at 5. The coating-process (high pH) wastewater was being collected in a sump-pump collection area near the coating line then pumped, without any treatment, directly to an effluent pipe which discharged into manhole #1. Ibid.

In contrast, the galvanizing-process (low pH) wastewater was being sent to a series of two connected holding tanks in Riverdale Mills' wastewater treatment area (in the building's basement). Id. at 4. However, the treatment systems in this area were nonoperational. In particular, a mixer in the first holding tank was not functioning and both tanks had probes that were not connected to pH monitoring devices. Ibid. Further, the wastewater was being routed from the second tank directly to a sump-pump collection tank, which discharged into the effluent pipe (above) leading to manhole #1. Ibid. Additional settling tanks, a filter press, and "caustic soda" tank (for neutralizing the waste stream) were disconnected and being bypassed. Ibid. Further, there was no wastewater treatment operator present, and no records or maintenance logs available. Ibid. When asked who was responsible for the treatment system, Riverdale Mills representatives identified Knott (who was not present during this portion of the tour). Ibid. At the closing conference (*supra*), Knott declined the invitation to re-visit the treatment area to view the problems identified there. Ibid. Knott had told inspectors, at the opening conference, that the company was combining its waste streams, raising pH levels, and filtering the waste prior to discharge. Id. at 1; CR 52 (Exh. D), JA 14 at 9-10.

C. Criminal Investigation

1. November 1997 Search

EPA officials reported the results of the civil inspection to the agency's Criminal Investigation Division ("CID"). Based in large part on this evidence, CID agents sought and obtained a federal search warrant for the Riverdale Mills facility, CR 52 (Exh. D), JA 14, and executed the warrant on November 7, 1997.[5] The agents were accompanied by civil inspectors, who performed sampling and provided other technical assistance.

Two technicians (Bill Osbahr and Peter Kudaraskas) were assigned to perform sampling outside of the facility. The technicians began sampling at both manholes 1 and 2 (above). Between 11:06 a.m. and 11:33 a.m., Osbahr took seven screening measurements at manhole #2 with pH paper. Five of the readings were around "5", two of the readings were around "6". CR 52 (Exh. E), JA 15 at 1.[6]

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[5]In a letter to the United State's Attorney's Office dated December 27, 1997, Knott alleged that EPA agents engaged in "outlandish" behavior during the search, including the "display" of firearms and aggressive interviewing and videotaping. CR 52 (Exh. G), JA 17 at 2. While CID agents were armed during the search, their firearms remained holstered at all times. CR 52 (Exh. F), JA 16 at 12, n. 3. Further, while agents conducted interviews and took videos and photographs, their conduct was according to protocol and within professional norms at all times. Ibid.

[6]The sample results from both the civil inspection and search warrant were presented to the district court in the form of a chart showing the various sample

Some of the samples contained paper solids, indicative of sanitary rather than industrial process wastes. Ibid. At 11:11 a.m., Kudaraskas obtained a few samples at manhole #1, with similar pH readings. CR 68 (Exh. 3), JA 26 at 2.

At around 11:45 a.m., Osbahr moved to manhole #1 to assist Kudaraskas in taking and recording readings with the pH meter at that manhole. Between 11:45 a.m. and 2:45 p.m., the technicians recorded 46 pH measurements at varying intervals, depending on the presence of a discharge. For the most part, the pH readings decreased throughout the measurement period, with all but one early reading being below 5.0. CR 68 (Exh. 4), JA 27 at 1-2; CR 68 (Exh. 3), JA 26 at 2. The final three measurements – of grab samples taken between 2:20 and 2:44 p.m. – were below 3.0. Id.

Members of the search team also inspected Riverdale Mills' wastewater treatment system and observed that it remained largely nonoperational and that Riverdale Mills was not treating its waste as represented in its permit application. Unlike conditions during the civil inspection on October 21, 1997, the coating-process waste was being sent to basement holding tanks, for combination with the galvanizing-process wastewater, before being discharged to the sewer line in the street. However, like conditions on October 21, 1997, the filter press and caustic

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results and notations recorded on field logs. CR 68 (Exh. 3), JA 26.

soda tanks remained disconnected from the discharge stream. CR 68 (Exh. 4), JA 27 at 3.

Interviews of Riverdale Mills employees conducted after the search confirmed that the company stopped operating its wastewater treatment system sometime in the spring of 1997 and was making no effort to coordinate discharges to provide neutralization through mixing. CR 52 (Exh. F), JA 16 at 9; CR 68, JA 23 at 20-21. Interviews and documents obtained by agents also revealed that Knott was repeatedly advised of the status of the system and was aware that the company was discharging without a treatment system in place. Ibid.

2. July 1998 Search

In the period following the criminal search, Knott sent letters to the United States' Attorneys Office stating again that he owned Riverdale Street and the underlying sewer line. CR 52 (Exhs. G & H), JA 17 at 3, JA 18. In separate communications, Knott argued that the infiltration of groundwater into this sewer line (from the adjacent Blackstone River) tended to neutralize Riverdale Mills' wastewater before the wastewater reached the public sewer line at manhole #2. CR 52 (Exh. F), JA 16 at 10. The sewer line between manholes 1 and 2 is approximately 300 feet long. Id. at 11. There are two sanitary-line connections

from Riverdale Mills between the manholes,[7] but no designed wastewater treatment or monitoring systems of any kind. Ibid.

Although the United States had grounds to argue that manhole #1 and the sewer line under Riverdale Street were part of the "public sewer" (because installed by the Town of Northbridge), CR 20 at 4, n. 2, prosecutors and agents made a strategic decision not to rely exclusively on this ownership claim. Therefore, on July 17, 1998, CID agents sought and obtained a second search warrant for the Riverdale Mills' facility, for the purpose of obtaining evidence of the degree of groundwater infiltration in the sewer line under Riverdale Street, to determine the effect of such infiltration on Riverdale Mills' process wastes. CR 68 (Exh. F), JA 16. CID agents executed the warrant on July 19, 1998. During the search, agents and technical assistants videotaped the inside of the sewer line (with a motorized camera) and took samples to determine alkalinity levels of wastewater in the sewer and of groundwater outside the line. Id.; CR 72, JA 28 at 3.

Based on the results of the search, prosecutors determined that the results of wastewater sampling performed at manhole #1 on October 21, 1997 and

[7]In its application for a sewer permit, Riverdale Mills projected a discharge of 1,500 gallons per day of "sewage," as opposed to approximately 57,600 gallons per day of industrial process waste. CR 16, JA 3 at 19.

November 7, 1997 could be used to prove discharge violations on those dates, even if the public sewer did not begin until manhole #2. As proffered to the district court, had this case proceeded to trial, the United States would have called an expert witness, Brian McKeown, to testify about the effect of groundwater infiltration and sanitary discharges on the pH level of Riverdale Mills' industrial wastewater between manhole #1 and manhole #2. CR 68, JA 23 at 18, 22. In an affidavit presented to the court in response to defendants' Hyde Amendment application, McKeown stated that "*at a minimum*, all samples collected at manhole #1 . . . with a pH value of 3.0 or less would have been in violation of the federal prohibition against discharges with pH lower than 5.0 at manhole #2, even after mixing with groundwater (from infiltration) and sanitary wastewater discharged between [the] manhole[s]." CR 72, JA 28 at 3 (emphasis added). Fifteen samples taken at manhole #1 on October 21, 1997 had pH readings below 3.0. CR 68 (Exh. 3), JA 26 at 1. Three samples taken at manhole #1 on November 7, 1997 had pH readings below 3.0. Id. at 2.

D. Findings on Hyde Amendment Application

The district court granted Riverdale Mills' Hyde Amendment application after making the following findings. First, the court found that the United States "did not . . . have any credible evidence" to show that the defendants discharged

waste with a pH of less that 5.0 into the public sewer. CR 77, Add. 1 at 11. The court stated that samples taken at manhole #2, the presumptive point of discharge into the public sewer, showed that Riverdale Mills was in compliance with applicable standards, id., and that, "for unexplained reasons," the United States failed to take further samples at manhole #2, "leaving the impression, at least, that the government . . . had no reasonable expectation of discovering a violation" by such sampling. Id. at 13. The court concluded that the United States "persisted in the presentation of evidence to the Grand Jury" without any evidence of an illegal wastewater discharge at manhole #2. Ibid.

Second, the court found that "EPA's collection of evidence" in support of the charges in the indictment was "suspect." Id. at 12. The court stated that EPA civil inspectors "ignored the clear condition that Knott imposed upon his consent" for the October 21, 1997 inspection and "surreptitiously obtained samples in the absence of [Riverdale Mills'] personnel." Ibid. The court also found that the defendants "presented credible evidence that recorded sample readings were altered," and that, "[a]pparently, several recorded readings in the pH '7' range taken at both manholes #1 and #2 were altered to look like readings in the '2' and '4' ranges." Ibid.

Third, the court found that the United States "intensified" the defendants' "humiliation" for being criminally prosecuted by issuing a press release following indictment, stating that the defendants were "knowingly polluting the rivers of the Commonwealth." Ibid.[8]

Fourth, the court found that the United States failed to produce exculpatory information to the defendants, as part of its "automatic" discovery obligation pursuant to local rule.[9] Id. at 13. In particular, the court cited a "laboratory log" from the November 7, 1997 search, which contained a "small number" of compliant samples from manhole #1. Ibid. Although the United States did not produce this log on September 14, 1998, when it made "automatic" production of

[8]The U.S. Attorney's Office and EPA issued separate press releases. In pertinent part, the press release from the U.S. Attorney's Office stated that "discharging acidic wastewater into a public sewer system corrodes and undermines environmental regulations that must be obeyed in order to assure that our rivers are not polluted," CR 52 (Exh. I), JA 19. The press release from the EPA stated that "wastewater which is highly acidic can damage sewer treatment facilities and it can be harmful to aquatic life when it is eventually discharge into surface waters after it has been treated at municipal treatment plants." CR 52 (Exh. J), JA 20.

[9]Local Rule 116.1 of the District Court for the District of Massachusetts requires prosecutors to make "automatic" disclosure of exculpatory evidence and other designated discovery material, whether or not requested, within 14 days of arraignment.

discovery material under the local rule, the United States did produce this log, upon defendants' request, on November 23, 1998. CR 52, JA 10 at 10.

Finally, the district court stated that it was "troubled by the government's unnecessary harassment of defendants and their employees during the November 7 search," at which time "a virtual 'SWAT team' consisting of twenty-one EPA law enforcement officers and agents, many of whom were armed, stormed the [Riverdale Mills] facility . . . [and] vigorously interrogated and videotaped employees causing them great distress and discomfort." Id. at 13-14.

SUMMARY OF ARGUMENT

The Hyde Amendment authorizes district courts to award attorneys fees and costs to criminal defendants only in cases where defendants are able to prove that the United States' position was "vexatious, frivolous, or in bad faith." This means, in effect, that defendants must prove prosecutorial misconduct. In the present case, the district court ruled that the United States' position was "vexatious" – although not "provably frivolous or in bad faith" – because, in the view of the court: (a) there was no credible evidence to support the charges in the indictment and (b) Government agents and prosecutors had engaged in certain isolated acts that tended to "humiliate" and "harass" the defendants.

The court's ruling constitutes an abuse of discretion for three reasons. First, the court applied the wrong legal standard. In order for a prosecution to be "vexatious" under the Hyde Amendment, the prosecution must be both without foundation and pursued maliciously or for an improper purpose. In the present case, the district court found only that the prosecution lacked foundation and effectively caused vexation. The court did not expressly find that prosecutors acted with malice, or otherwise in bad faith, or even unreasonably. Second, the court's finding that the prosecution lacked foundation is clearly erroneous. The United States had ample evidence to prove the charges in the indictment, beyond a reasonable doubt, until the district court granted defendants' motion to suppress. In ruling that the United States never had credible evidence to support its charges, the district court misinterpreted the meaning of sample results and completely failed to consider critical evidence the United States proffered in its response to the defendants' motion. Finally, the court abused its discretion in identifying certain isolated acts of agents and prosecutors as evidence of vexatiousness. There was nothing improper or unusual about the execution of the November 1997 search warrant or about the press releases that announced the indictment. Nor was the government's failure to produce certain field logs (until asked by the defendants) anything more than an inadvertent violation of a local discovery rule,

if a violation at all. The district court's conflation of these unrelated and unexceptional events into evidence of impropriety was a clear abuse of discretion.

STANDARD OF REVIEW

A district court's decision to grant or deny an award under the Hyde Amendment is reviewed for abuse of discretion. See United States v. Lindberg, 220 F.3d 1120, 1123 (9th Cir. 2000); United States v. Truesdale, 211 F.3d 898, 906 (5th Cir. 2000); United States v. Gilbert, 198 F.3d 1293, 1298 (11th Cir. 1999); see also United States v. One Parcel of Real Property, 960 F.2d 200, 208 (1st Cir. 1992) (applying abuse of discretion standard for reviewing award under EAJA). A district court abuses its discretion when it "relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them." Waste Management Holdings, Inc. v. Mowbray, 208 F.3d 288, 295 (1st Cir. 2000). A district court also abuses its discretion if it applies an incorrect legal standard, id., or bases an award upon findings of fact that are clearly erroneous. Gilbert, 198 F.3d at 1298.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ITS APPLICATION OF THE "VEXATIOUS" STANDARD

A. The Hyde Amendment Provides for Recovery of Attorneys Fees and Costs Only in Cases of Prosecutorial Misconduct

The Hyde Amendment was enacted as part of the Department of Justice appropriations bill for fiscal year 1998, in response to perceived cases of prosecutorial abuse. See United States v. Gilbert, 198 F.3d 1293, 1299-1302 (11th Cir. 1999) (reviewing legislative history). The purpose of the amendment was to allow defendants to recover attorneys fees and costs in cases of prosecutorial misconduct. Ibid. As originally drafted, the amendment would have authorized the payment of attorneys fees and costs to prevailing criminal defendants under the standards that apply to civil litigants under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A). However, in response to concerns that these standards would unduly chill federal law enforcement, Congress made the standards for recovery under the Hyde Amendment considerably more stringent. See Gilbert, 198 F.3d at 1300-1302.

As enacted, the Hyde Amendment differs from EAJA in two significant aspects. First, while EAJA authorizes payment to a prevailing party in any case where the position of the United States was "not substantially justified," see 28

U.S.C. § 2412(d)(1)(A), the Hyde Amendment allows recovery to criminal defendants only in cases where "the court finds that the position of the United States was vexatious, frivolous, or in bad faith." Congress intended this language to impose a high hurdle. See Gilbert, 198 F.3d at 1302. Before adopting this language, Congress also considered allowing awards in cases where the Government's position was "without foundation." Ibid. Like the EAJA standard, this standard was rejected as being too easy to meet. Ibid.

Second, while EAJA has been interpreted to place the burden of proof with the United States (to prove that its position was substantially justified), see One Parcel of Real Property, 960 F.2d at 208, the Hyde amendment places the burden of proof on the moving defendant. The Amendment expressly states that awards in criminal cases "shall be granted pursuant to the procedures and limitations (*but not the burden of proof*) provided [under EAJA]." See Pub. L. No. 105-119, 111 State 2440, 2519 (emphasis added). This means that to recover attorneys fees and costs under the Hyde Amendment, a defendant bears the burden of proving that the Government's position was "vexatious," "frivolous," or in "bad faith." See Gilbert, 198 F.3d at 1302; United States v. Lindberg, 220 F.3d 1120, 1124 (9th Cir. 2000); In re 1997 Grand Jury, 215 F.3d 430, 436 (4th Cir. 2000); United States v. Truesdale, 211 F.3d 898, 907 (5th Cir. 2000). Further, while none of these terms is

defined in the amendment, the amendment's legislative history plainly illustrates that to make the requisite showing under any of these terms, the defendant must do more than show that the Government's position was "not substantially justified" or "without foundation." See Lindberg, 220 F.3d at 1125; Truesdale, 211 F.3d at 907-8; Gilbert, 198 F.3d at 1302.

For assistance in determining what additional proof is required, courts have looked to dictionary definitions and common usage of the relevant terms. See, e.g., Lindberg, 220 F.3d at 1125, In re 1997 Grand Jury, 215 F.3d at 436, Gilbert, 198 F.3d at 1298-9; see also Davila-Perez v. Lockheed Martin Corp., 202 F.3d 464, 468 (1st Cir. 2000) (undefined terms are to be accorded their "ordinary meaning, with all due consideration to the context."). The term "vexatious" means "causing or likely to cause vexation" or "lacking justification *and* intended to harass." See Webster's Third New International Dictionary 2548 (1986) (emphasis added). In the legal context, a "vexatious suit" or "vexatious proceeding" is a proceeding "instituted maliciously and without good cause." See Black's Law Dictionary 1559 (7th ed. 1999); see also Ballentine's Law Dictionary 1341 (3rd Ed. 1969) ("vexatious suit" is invoked "not for the attainment of justice, but to further . . . a malicious motive.") The term "frivolous" likewise connotes a position that more than lacks in foundation. A "frivolous" position is "clearly

insufficient," see Black's Law Dictionary 668 (6th ed. 1990), or "utterly without foundation in law or fact." Gilbert, 198 F.3d at 1299. Finally, "bad faith" means not simply bad judgment or negligence, but "the conscious doing of a wrong because of dishonest purpose or moral obliquity." See Black's Law Dictionary 139 (6th ed. 1990). In short, to meet the requisite proof under any of the Hyde Amendment terms, a defendant must show that the "position underlying the prosecution amounts to prosecutorial misconduct." Gilbert, 198 F.3d at 1299.

B. The District Court Did Not Require The Defendants To Prove Prosecutorial Misconduct

Although the district court expressly acknowledged that Hyde Amendment applicants must prove prosecutorial misconduct to recover fees and costs, CR 77, Add. 1 at 11 (citing Gilbert), the district court did not hold the defendants in this case to that standard. The district court quoted two definitions from Black's Law Dictionary: (1) a definition of "vexatious," stating that "vexatious" means "without reasonable or probable cause of excuse," and (2) a definition of the term to "vex," stating that a charge is "vexatious" if it is "calculated 'to harass, disquiet or annoy.'" Id. at 10. The former definition contains no mention of intent to harass, while the latter definition – like the definition of "vexatious suit" (above) – suggests that such intent is fundamental. In finding that the Government's

prosecution was "clearly vexatious," the district court appeared to rely only on the former definition. That is, the district court did not make any express finding that the agents or prosecutors in this case acted "maliciously" or with any personal motive to "vex" or harass these defendants. In the absence of such a finding, the district court's conclusion was clearly erroneous.

As noted above, a defendant cannot meet the Hyde Amendment standard simply by showing that charges brought by the United States were ultimately determined to be without evidentiary or legal foundation. See Lindberg, 220 F.3d at 1125; In re 1997 Grand Jury, 215 F.3d at 436; Gilbert, 198 F.3d at 1303-5. A finding that a prosecution simply lacked "reasonable or probable cause" is not meaningfully different from a finding that the prosecution was "without foundation." Likewise, because nearly every indictment causes "vexation" (or consternation) from the perspective of the accused, the fact that an indictment causes vexation cannot be sufficient to make the Government's action "vexatious" under the Hyde Amendment. Consequently, to prove a "vexatious" prosecution, a defendant must show that the agents or prosecutors knew the charges were baseless when filed, and thus acted out of malice or for some other improper purpose. See Black's Law Dictionary 1559 (7th ed. 1999) (definition of "vexatious suit").

This is not to say that defendants must always prove subjective bad faith to recover fees and costs under the Hyde Amendment. If a defendant can demonstrate that the United States pursued a position that was "so obviously wrong" that no reasonable prosecutor could have supported it, proof of subjective bad faith may be unnecessary. See Gilbert, 198 F.3d at 1304. However, the district court did not make such a finding in this case. That is, while the court found that the Government lacked "credible evidence" to support the charges in the indictment – and thus that the charges lacked foundation – the court did not find that the Government's theory of the evidence was so much in error that no reasonable prosecutor could have supported it.

Absent a finding that the Government's position was so unreasonable as to be frivolous, a finding of subjective bad faith is necessary. See Gilbert, 198 F.3d at 1303; but see Local 285 v. Nonotuck Resource Associates, Inc., 64 F.3d 735, 737-8 (1st Cir. 1995).[10] While the district court stated that it was "troubled" by

[10]In Local 285, this Court addressed the common law standard for attorneys' fee awards in cases involving private litigants. Under the so-called "American Rule," litigants generally bear their own costs, with the exception that the court may award fees and costs to the prevailing party if the court determines that the losing party "acted in bad faith, *vexatiously*, or for oppressive reasons." Id. 64 F.3d at 737 (emphasis added). This Court held that "vexatiously" in that context meant that the losing party's actions were "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Id. (quoting Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978)) (internal citations

individual acts of agents and prosecutors that had the effect of "harassing" and "humiliating" the defendants, CR 77, Add 1 at 13-14, the district court did not find that this conduct was malicious or arose to the level of bad faith. To the contrary, the district court ultimately found that the Government's position was "not provably frivolous or in bad faith." Id. at 14.

In ruling that the Government's position was "vexatious" without being "frivolous" or "in bad faith," the district court emphasized the Hyde Amendment's use of the disjunctive "or." Id. at 10. This usage indicates that a defendant need not prove all three terms to qualify for an award. Nevertheless, the district court failed to explain how it was using the term "vexatious" or how the term could be meaningfully understood absent any reference to the notions of "frivolousness" or bad faith, broadly defined. In ordinary usage, the terms overlap. For example, a "vexatious" action can be defined as one brought "frivolously." See Cristianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).[11] Likewise, a "frivolous" action can be defined as one "often brought to embarrass or annoy." See Gilbert, 198 F.3d 1299 (citing Black's Law Dictionary 668 (6th Ed. 1990)). The fact that

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omitted). This definition is not in accord with the Hyde Amendment, to the extent that it allows recovery upon a showing that the losing party's position was simply "without foundation." (See above.)

[11]See note 8.

Congress did not attempt to separately define these overlapping terms indicates that Congress did not intend for them to have wholly independent meanings. Rather, by using the three terms together – as an alternative to the lesser standards "not substantially justified" and "without foundation" – Congress intended each term to convey a different aspect of prosecutorial misconduct. In this light, a "vexatious" prosecution is one brought maliciously or solely to harass.

There is no evidence of malice or improper motive in the present case. To the contrary, the circumstances behind the dismissal of the indictment illustrate that agents and prosecutors acted in good faith to enforce violations of the law. Indeed, although the district court suppressed sampling results from the October 1997 civil inspection, the district court found (in its ruling on suppression) that criminal agents had relied on these sampling results in good faith. CR 29, Add. 2 at 8-10. The United States moved to dismiss the indictment only after the suppression of this critical evidence. That is, despite the remaining evidence demonstrating knowing violations of the Clean Water Act, prosecutors decided to dismiss the indictment rather than proceed with a weakened case.

Prosecutors should always reevaluate their cases after significant pre-trial evidentiary rulings or other developments, and should be encouraged to dismiss cases if there is no longer sufficient evidence to proceed to trial. The district

court's Hyde Amendment ruling risks sending the opposite message. That is, if a decision to dismiss an indictment can be used to suggest "vexatiousness" on the part of prosecutors, prosecutors might be encouraged to press forward with weakened cases, which would otherwise be voluntarily dismissed, in order to make a record that there was a good faith basis to support the charges. In the present case, prosecutors sought dismissal of the indictment, in good faith, after losing critical evidence. The district court erred, as a matter of law, in finding the Government's position to be "vexatious," in the absence of any evidence that would support a finding of improper motive.

II. THE DISTRICT COURT CLEARLY ERRED IN FINDING THAT THERE WAS NO "CREDIBLE EVIDENCE" TO SUPPORT THE CHARGES IN THE INDICTMENT

In addition to failing to adequately define the appropriate legal standard and relying on an improper definition of "vexatious," the district court abused its discretion by relying on clearly erroneous and unsupported findings of fact. The district court's ruling on "vexatiousness" was premised primarily on the court's factual finding that the United States never had any "credible evidence" to support the charges of the indictment. CR 77, Add. 1 at 11. Although this case never went to trial, the evidence upon which the United States would have relied was

presented to the court by proffer, affidavits, and exhibits presented with the Hyde Amendment pleadings, and through the testimony introduced at the suppression hearing. This evidence was more than sufficient to support both charges. In ruling otherwise, the district court failed to address the United States' theory of the case and improperly credited unsubstantiated allegations made by the defendants.

A. The District Court Failed to Address Evidence Proffered By the United States

1. The United States Had Ample Evidence to Prove the Charges in the Indictment

The indictment in this case charged the defendants with discharging wastewater with a pH below 5.0 s.u., into the Northbridge public sewer system, on two dates: (1) October 21, 1997, the date of the civil inspection; and (2) November 7, 1997, the date of the first criminal search. CR 1, JA 2. There is no dispute that on both days (and at all time relevant to the indictment), Riverdale Mills generated highly acidic wastewater (pH around 2.0 or below) and highly caustic wastewater (pH around 12.0 or above), and discharged both types of wastewater to the public sewer in intermittent batches. CR 52 (Exh. C), JA 13 at 2; CR 68 (Exh. 2), JA 25; CR 44, JA 5 at 21-23. It is likewise undisputed that Riverdale Mills obtained a permit for such discharges upon the representation that the company would treat and monitor its waste, prior to discharge, to ensure that the waste met municipal

and national pretreatment standards. CR 16, JA 3 at 2, 8. With respect to treatment, Riverdale Mills represented that it would blend the acidic and caustic wastes for neutralization *and* add caustic soda to the blended waste, because the blended waste would remain "significantly acid," and below acceptable pH levels, without such treatment. Id. at 18.

The United States also had uncontradicted evidence, including employee testimony and admissions from Knott, that on the dates charged in the indictment and for a significant period prior to those dates, Riverdale Mills was discharging its wastewater without treatment. CR 16, JA 3 at 41-2; CR 52 (Exh. F), JA 16 at 9; CR 68, JA 23 at 20-21. On October 21, 1997, when EPA inspectors arrived for an unannounced inspection, they discovered that Riverdale Mills was not blending its wastewater, not adding caustic soda, and not monitoring the pH of its discharges. CR 68 (Exh. 2), JA 25 at 5. Samples taken by the inspectors at manhole #1 – the first manhole in the sewer line outside the building – demonstrated that the company's discharges on that day were highly variable and that very low-pH wastes were discharged during at least two different periods in the afternoon. CR 68 (Exh. 3), JA 26 at 1. Altogether, inspectors tested sixteen samples that had pH below 5.0, of which fifteen were below 3.0. Ibid.

When EPA criminal agents returned to execute a search warrant on November 7, 1997, they discovered that Riverdale Mills' wastewater treatment system remained largely nonfunctional. Although Riverdale Mills appeared to be combing the acidic and caustic wastes before discharge, the company was not adding caustic soda, was not monitoring the discharge, and was bypassing other treatment equipment. CR 68 (Exh. 4), JA 27 at 3. Numerous samples collected during the search at manhole #1 had low pH readings, including 53 samples below 5.0, three of which were below 3.0. CR 68 (Exh. 3), JA 26 at 2.

Finally, although Knott claimed ownership of the sewer line beneath Riverdale Street, the United States also had ample reason to believe that highly acidic wastes sampled at manhole #1 would and did remain highly acidic downstream at manhole #2, where Knott's "private" sewer ended. There was no treatment system between the manholes and only 300 feet of sewer pipe. CR 52 (Exh. F), JA 16 at 10-11. The defendants argued that the waste was neutralized between the manholes not by anything within their control, but by groundwater infiltration, sanitary flows, and happenstance. Ibid. Before presenting the indictment in this case, the United States conducted a second search at the Riverdale Mills facility for the specific purpose of obtaining evidence of the degree of groundwater infiltration in the sewer line, to determine the effect such

infiltration and sanitary flows would have on the industrial waste between manholes #1 and #2. Id. at 11-12. The United States was prepared to offer expert testimony at trial that, at a minimum, wastewater discharges with a pH of 3.0 at manhole #1 would have a pH below 5.0 at manhole #2. CR 72, JA 28 at 3. The United States took multiple samples from manhole #1 with pH readings below 3.0 s.u., on both days charged in the indictment. CR 68 (Exh. 3), JA 26 at 1-2.

In finding that the United States had no "credible evidence," the district court ignored virtually all of the evidence outlined above. In particular, the district court completely failed to acknowledge the three critical points in the Government's proof, namely: (1) the evidence that Riverdale Mills needed to treat its waste to ensure compliance with the national pretreatment standard for pH, given the high variability of its waste streams and the intermittent nature of its discharges; (2) the uncontradicted evidence that Riverdale Mills was not using its treatment system on the days charged in the indictment (and for months in advance of those days); and (3) the expert testimony that numerous samples obtained at manhole #1 demonstrated violations at manhole #2. The district court's failure to address the Government's theory of the evidence – while purportedly assessing the credibility of this evidence – was a clear abuse of discretion.

2. The District Court Misinterpreted Sampling Evidence

Instead of addressing the Government's theory of the evidence – that samples obtained at manhole #1 proved unlawful discharges at manhole #2 – the district court focused exclusively on sampling done at manhole #2, stating that such sampling "showed that RMC was *not* in violation of the Clean Water Act." CR 77, Add. 1 at 11 (emphasis in original). This finding is clearly in error. The EPA sampled Riverdale Mills' discharges at manhole #2 on two limited occasions. The EPA took one sample[12] from manhole #2 at the end of the civil inspection. CR 68 (Exh. 2), JA 25 at 6. The EPA took seven samples from manhole #2 at the beginning of the criminal search, all between 11:06 a.m. and 11:33 a.m., a less than 30-minute time period. CR 52 (Exh. E), JA 15 at 1; CR 68 (Exh. 3), JA 26 at 2. These latter samples were found to have pH readings of "5" or "6", id., while the sample from the civil inspection was found to have a pH of "4" (CR 68 (Exh. 2), JA 25 at 6) – although the defendants argue the reading was actually "7". CR 52, JA 10 at 4. Even if the one "4" is disregarded, and consequently, it is presumed that all of the manhole #2 samples had pH readings of "5" or above, these results prove only that Riverdale Mills was not discharging in violation of

[12]Although the EPA took three samples from the manhole, only one sample was of waste flowing from Riverdale Mills' sewer line. See pp. 14-15, above.

the national pretreatment standard, at the specific times those samples were taken.

The manhole #2 sample results cannot be used to prove that all of Riverdale Mills' discharges on October 21 and November 7, 1997 were in compliance with the national pretreatment standard. Riverdale Mills discharged its industrial-process wastes in intermittent batches that had widely varying pH levels. The manhole #2 samples were not taken at or around the same time as the key samples from manhole #1 – *i.e.,* the samples that had pH levels below 3.0 – and thus do not undermine the expert testimony that the industrial wastes discharged during these times caused violations at manhole #2.[13] For October 21, 1997, the manhole #1 samples with pH readings below 3.0 were taken between 12:40 and 3:02 p.m., well before the manhole #2 sample, which was taken at 3:48 p.m.. CR 68 (Exh. 3), JA 26 at 1. For November 7, 1997, the samples with pH readings below 3.0

[13]Further, the samples of wastewater taken at manhole #2 may not have even included industrial-process wastes. Although all batches of industrial-process wastes discharged into manhole #1 flowed to manhole #2, not all flows at manhole #2 contained the process wastes. Sanitary wastes (from Riverdale Mills' sinks and toilets) were discharged to the sewer line at points between the manholes and could flow to manhole #2, at times that industrial-process wastes were not being discharged. CR 52 (Exh. F), JA 16 at 11. At least some of the manhole #2 samples taken during the search warrant were taken at times there was no flow at manhole #1, and contained paper solids – indicating sanitary, rather than industrial-process waste. CR 52 (Exh. E), JA 15 at 1; CR 68, JA 23 at 18, n.5

were taken between 2:20 and 2:44 p.m., hours after the final manhole #2 sample, which was taken at 11:33 a.m.. Id. at 2. Given the variability of Riverdale Mills' wastewater discharges and the different sampling times, the district court clearly erred in assuming that the manhole #2 results proved that the unlawful discharges of industrial-process wastes – *i.e.*, the discharges with pH readings below 3.0 at manhole #1 – were neutralized before reaching manhole #2.[14]

The district court likewise committed clear error in suggesting that the EPA's failure to do more sampling at manhole #2 was proof that EPA inspectors had no "reasonable expectation of discovering a violation" at manhole #2. CR 77, Add. 1 at 13. EPA inspectors sampled at manhole #1 on October 21, 1997, because defendant Knott directed them there. CR 44, JA 5 at 17, 19. EPA technicians returned to manhole #1 when executing the search warrant approximately two weeks later, because it was the closest sampling point to Riverdale Mills' sewer discharge. CR 68 (Exh. 4), JA 27 at 1. Although EPA officials knew of Knott's claim of ownership to the sewer under Riverdale Street at the time of the criminal search, the issue was unresolved. CR 52 (Exh. D), JA

[14]Indeed, on the one occasion that manhole #1 and manhole #2 were sampled at the same time (around 11:11 a.m., on the morning of November 7, 1997) the pH levels at both manholes were similar. CR 68 (Exh. 3), JA 26 at 2.

14 at 9. In sampling at manhole #1 on both days (October 21 and November 7), EPA inspectors recorded pH levels hundreds of times more acidic than the applicable pretreatment minimum. CR 68 (Exh. 3), JA 26 at 1-2. EPA inspectors also knew that Riverdale Mills had no treatment or monitoring systems in the sewer line between manholes #1 and #2. Consequently, although there was a possibility that groundwater infiltration or sanitary flows would affect pH levels, EPA inspectors had ample reason to believe that the wastewater would remain below the applicable pretreatment limit at manhole #2.

In retrospect, EPA could (and perhaps should) have taken more samples from manhole #2. Had they done so, the results from such sampling may have survived the motion to suppress,[15] and would have allowed the United States to prove pH levels at manhole #2 without expert analysis. Nevertheless, given the results obtained at manhole #1, the agents' knowledge of the lack of treatment between the manholes, and the confusion regarding ownership of the sewer line, the failure of the agents to take more samples at manhole #2 demonstrates, at most, an assumption that changing the sampling point would not change the results, or a

[15]In its Hyde Amendment ruling, the district court stated that manhole #2 was on public property and subject to search without consent. See CR 77, Add. 1 at 13. However, in an affidavit filed with his motion to suppress, Knott asserted that manhole #2, like manhole #1, was on Riverdale Mills' property. CR 9 at 2 (¶ 10).

failure to appreciate the potential significance of the distinction between the manholes. There is nothing in the record to suggest that agents believed that process-waste samples obtained at manhole #1, which were found to have pH levels hundreds of times below the applicable limit, would be compliant by the time they reached manhole #2, only 300 feet downstream. If the sampling plan was flawed – and the prosecutors' reliance on the sampling results ultimately unfounded – these errors were nothing more than honest mistakes. The Hyde Amendment is "targeted at prosecutorial misconduct, not prosecutorial mistake." Gilbert, 198 F.3d at 1304.

B. The District Court Had No Grounds For Discrediting The United States' Evidence Collection

Instead of addressing the specifics of the United States' proof in its Hyde Amendment ruling, the district court dismissed the entirety of the Government's evidence collection as "suspect," on the grounds that: (1) the EPA inspectors "surreptitiously" obtained samples in violation of a "clear condition" Knott placed on his consent; and (2) "someone" altered various compliant pH readings taken during the inspections, to make them look noncompliant. CR 77, Add. 1 at 12. Neither finding is supported by the record.

First, there is no evidence that EPA inspectors acted with the intent to evade Knott's instructions during the consent inspection. Knott himself testified that he placed no specific conditions on sampling and testing. CR 44, JA 5 at 188. Rather, according to Knott, he gave a general instruction that the inspectors were to be "accompanied at all times" during their inspection of the facilities. Id. at 165-6. The sampling in question occurred at a manhole outside the facility during two afternoon breaks in the tour of the facility. Id. at 19-21, 186-7. Knott had already consented to sampling at that location, and the sampling was done in the open, in clear view of employees in the building. Id.; JA 6 at 1-2 (photos). Further, the inspectors testified that Riverdale Mills employees were made aware of and never objected to such sampling. CR 44, JA 5 at 27-8, 34-5, 126-7.

In ruling on the defendants' suppression motion, the district court found that Knott "explicitly conditioned his consent . . . on the physical presence of [Riverdale Mills] representatives during the inspection" and that a "reasonable person would have understood [this] instruction to mean that no sampling was to occur unless [a Riverdale Mills] representative was present." CR 29, Add. 2 at 6. Consequently, the court ruled that the inspectors in fact exceeded the scope of Knott's consent. Ibid. However, in so doing, the district court did not find that the inspectors intended to violate the terms of a "clear" instruction, or that the

inspectors acted in "bad faith" or in any "surreptitious" manner. To the contrary, the district court found that the sampling activity was conducted in the open, in a manner, "clearly visible from the [Riverdale Mills] facility." Id. at 4. This finding plainly contradicts the court's later finding (in its Hyde Amendment ruling) that EPA employees acted "surreptitiously".

Second, there is no evidence in the record to support the court's conclusion regarding the alteration of sample results. Without specifying any particular evidence, the district court found that the defendants "presented credible evidence" that "someone" "apparently" altered "*several* recorded readings in the pH '7' range . . . to look like readings in the '2' and '4' ranges," CR 77, Add. 1 at 12 (emphasis added). At the suppression hearing, inspector Granz testified that he changed one reading in his log, writing a '4' over an apparent '7'. CR 44, JA 5 at 152. Granz testified that he had initially confused readings from two separate samples, and made the change as a correction. Ibid. Although this change was not made in accord with sampling protocol – which requires inspectors to cross out and initial changes – the defendants presented no evidence (beyond the alteration itself) that Granz deliberately falsified the result or had any motive to do so.

While the defendants asserted, in their Hyde Amendment application, that EPA inspectors recorded "several" other readings of "pH 7+" that "were written

over to look like "2's," (CR 52, JA 10 at 4), the defendants presented no evidence showing these other alleged alterations. The defendants cited two documents: (1) page 89 of Granz's log book (which contains several recorded "2's"); and (2) a letter from a forensic examiner retained by defense counsel. CR 52 (Exh. K), JA 21. While the letter states that an examination of Granz's log "revealed" unspecified "alterations, overwriting of numerals and letters, and strikeovers without proper initials for the corrections," the letter does not detail the alleged alterations, does not address the sample results on page 89, and does not mention the allegation that "2's" were written over "7's." Ibid. Not only does this letter fail to constitute evidence of any kind, it also fails to constitute an adequate proffer in support of the defendants' claim. The district court's conclusion that the defendants presented "credible evidence" of "several" alterations, is clearly erroneous.

Moreover, to prove that there was no evidence in this case upon which prosecutors could reasonably rely, the defendants had to do more than simply raise questions regarding the reliability, accuracy, or interpretation of recorded sample results. The defendants had to demonstrate, by a preponderance of the evidence, that the relevant sampling data was wholly fabricated, or wholly unreliable due to

obvious equipment or methodological errors. The district court clearly erred in finding that the defendants met this burden.[16]

III. THE CONDUCT OF AGENTS AND PROSECUTORS IN THIS CASE WAS NOT "VEXATIOUS" OR OTHERWISE UNPROFESSIONAL

In addition to its finding that the United States proceeded without "credible evidence," the district court found evidence of "vexatiousness" in various alleged acts of misconduct by agents and prosecutors. In particular, the court indicated that it was "troubled" by: (1) the content of press releases issued by the United States; (2) the United States' failure to produce certain field logs until asked; and

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[16]In their Hyde Amendment application, the defendants also proffered an expert report from James O'Shaughnessey. CR 52 (Exh. C), JA 13. O'Shaughnessey purported to perform pH testing in Riverdale Mills' sewer line, under operating conditions designed to simulate those that existed at the plant on the days of the EPA's sampling. In his report, O'Shaughnessey stated that no samples taken during his experiment — at manhole #1 or manhole #2 — had a pH below 6. The defendants proffered this report not to support their argument that groundwater in the sewer line neutralized Riverdale Mills' acidic discharges before the wastewater reached manhole #2, but to show that no acidic wastewater (wastewater with a pH below 5.0) could have entered the sewer line at all, and that every one of the EPA's sixty plus samples showing pH readings of less than 5.0 at manhole #1 must have resulted from "inaccurate equipment, incompetent testing, or deliberate falsification." CR 52, JA 10 at 13. The district court did not expressly address or rely on O'Shaughnessey's report. Nor could the court be justified in doing so, given the fact that O'Shaughnessey never testified and his methods and conclusions were never subject to review or cross-examination. Further, even if the report were accepted, it demonstrates, at most, a basis upon which the defendants may have been able to impeach EPA sampling results, had the case gone to trial.

(3) alleged harassment of Riverdale Mills' employees during the November 1997 search warrant. CR 77, Add. 1 at 13-14. However, there is nothing about any of these cited acts that warrants the court's concern or that supports the court's finding of vexatiousness.

First, contrary to the district court's characterization, the United States did not issue press releases stating "that Riverdale Mills and Knott were knowingly polluting the rivers of the Commonwealth." CR 77, Add. 1 at 13. Rather, the press releases stated, in pertinent part: that the defendants were indicted, that the defendants were charged with knowingly discharging untreated wastewater into the sewer, and that the act of discharging acidic wastewater into the sewer can damage sewer systems and lead to pollution of rivers or other surface waters. CR 52 (Exhs. I & J), JA 19, 20. The press releases contained no incendiary, inflammatory, or otherwise improper content, and complied with all applicable rules. See, e.g., U.S. District Court for the District of Massachusetts Local Rule 83.2A ("Release of Information by Attorneys"). While these press releases may have, as the district court found, "intensified" the defendants' "humiliation at being prosecuted," (CR 77, Add. 1 at 13), such humiliation is a byproduct of any press release announcing any indictment and cannot be grounds for a Hyde Amendment award.

Second, the United States produced the "exculpatory evidence" cited by the court before the suppression hearing in this case and well before the scheduled trial date. While the logs contain evidence helpful to the defendants – including some sample results showing discharges in compliance with applicable limits – these results did not undermine the many sample results showing violations at other times. (See pp. 39-42, above.) Further, the timeliness of the production was not in violation of the United States' obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act (18 U.S.C. § 3500), or Rule 16 of the Federal Rules of Criminal Procedure. At most, the "late" production violated a local rule of the court.[17] The suggestion that the United States intentionally kept this evidence from the defendants is simply unfounded. As noted by the Eleventh Circuit, "[n]othing in the text or legislative history of the Hyde Amendment indicates that Congress intended to modify the law relating to discovery in criminal cases, to expand the Brady doctrine, or to categorize as prosecutorial misconduct actions which clearly were not misconduct under existing law." Gilbert, 198 F.3d at 1305. An inadvertent failure to comply with a time frame dictated in a local rule – assuming such failure occurred – does not amount to misconduct.

[17]See note 9.

Finally, the district court's finding that EPA agents "unnecessarily harassed" Riverdale Mills employees during the November 1997 search is both factually unsupported and irrelevant. While the defendants alleged, in their Hyde Amendment application, that EPA agents "stormed" the Riverdale Mills facility and engaged in various "extremely vexatious" and "unprofessional" conduct, the defendants presented no independent evidence to support these allegations. The only evidence proffered by the defendants was a letter written by Knott, (CR 52 (Exh. G), JA 17), and an affidavit prepared by Knott, (CR 9 at 4 (¶ 19)), which both contained similar, although not identical, allegations. In an affidavit submitted in support of the United States' application for the July 1998 search warrant, EPA Agent Stephen Creavin denied Knott's allegations that agents behaved unprofessionally during the November 1997 search. CR 52 (Exh. F), JA 16 at 12, n. 3. Creavin stated that, in accord with standard practices for the execution of criminal warrants, agents participating in the search were armed with service-revolvers, but that their weapons remained holstered at all times. Ibid. Nevertheless, despite the absence of any other evidence on the subject, the district court found, in its Hyde Amendment ruling, that a "virtual 'SWAT team'" stormed the Riverdale Mills' facility, unnecessarily "harassed" employees, and "caus[ed] them great distress and discomfort." The district court's finding of harassment –

based solely on unsubstantiated allegations from the defendant – is clearly improper.

Moreover, the finding is irrelevant. The search occurred nearly a year before the presentation of the indictment in this case. Until the indictment, there was no criminal case and no Government "position" for purposes of the Hyde Amendment. An isolated act of "aggressive questioning" or other allegedly improper behavior during the investigation of a case has no particular bearing on whether charges ultimately brought by the United States are "vexatious," "frivolous," or "in bad faith." The district court's readiness to accept this event — and the other isolated events above — as proof of "vexatiousness" was improper and an abuse of discretion.

Indeed, the Supreme Court has stated that decisions of federal prosecutors are to be accorded a "presumption of regularity." See United States v. Armstrong, 517 U.S. 456, 464 (1996). That is, "in the absence of clear evidence to the contrary, courts presume [that prosecutors] have properly discharged their official duties." Id. (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926)). In the present case, the district court presumed the opposite and plainly failed to hold the defendants to their burden of proof.

IV. BECAUSE THE DEFENDANTS FAILED TO PROFFER SUFFICIENT EVIDENCE TO SUPPORT A HYDE AMENDMENT AWARD, THERE ARE NO GROUNDS FOR FURTHER PROCEEDINGS ON REMAND

As outlined above, to prove that the Government's case was "frivolous" or "vexatious" – based on the alleged lack of credible evidence – the defendants had the burden of demonstrating either: (a) that the evidence was so lacking in veracity that no prosecutor could have reasonably relied on it, or (b) that the prosecutors were aware that the charges lacked foundation and thus proceeded to indictment solely to harass the defendants or for some other improper purpose. The evidence proffered by the defendants failed to meet either standard. Although evidence proffered by the defendants might have been used to impeach the Government's test results, had the case gone to trial, that evidence did not clearly undermine the results or the Government's expert testimony and does not support an inference that the prosecutors in this case knew – or that any reasonable prosecutor would have known – that no violations occurred. Likewise, there are no grounds for an inference that prosecutors acted with an intent to harass these defendants or with any other improper motive. The defendants failed to present any basis for a finding that there was something improper or out of the ordinary about the November 1997 search, or the press releases announcing the indictment. Further, the fact that the Government produced witness notes (field logs) to the defendants

upon their request, months before the scheduled trial date, cannot support an inference that the United States intended to hide exculpatory evidence. Given the failure of the defendants to provide a proffer sufficient to meet their burden of proof, a remand for further fact finding is unnecessary.

Nevertheless, if this Court were to find, based on all the information in the record: (1) that the defendants made a proffer of sufficient detail and substance to meet their burden of proof under the Hyde Amendment, and (2) that the explanations and evidence provided by the United State were insufficient to rebut the defendants' allegations, the United States believes that a remand for a limited evidentiary hearing would be required. As detailed above, the district court made critical findings of fact adverse to the United States based solely on the defendants' allegations, or inferences drawn in the absence of evidence, rather than on evidence formally presented on the record. In so doing, the district court failed to hold the defendants to their burden of proof, and deprived the United States of the opportunity to provide explanations where the record was deemed deficient. These actions constitute a clear abuse of discretion.

CONCLUSION

For the foregoing reasons, the judgment of the District Court awarding attorneys' fees and litigation expenses to defendant Riverdale Mills Corp. should be reversed.

Respectfully submitted,

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I certify that the two paper copies and one computer-readable disk copy of the foregoing Brief for Appellant United States of America have been served by Federal Express overnight delivery, this _____day of February, 2001, upon the following counsel of record:

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