No. 12-44

In The Supreme Court of the United States

ALI SHAYGAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

AMICUS CURIAE BRIEF OF THE CONSTITUTION PROJECT IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE

The Constitution Project (TCP) is a bipartisan, nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education.[1] TCP creates bipartisan committees and coalitions whose members are former government officials, judges, scholars, and other prominent citizens. These committees reach across ideological and partisan lines to craft consensus recommendations concerning pressing constitutional and legal issues. TCP devotes itself to the protection of fundamental constitutional rights including the right to due process and the right to the effective assistance of counsel, and TCP frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeals, and the highest state courts, in support of the protection of these rights.

TCP is particularly concerned with the right of criminal defendants to receive favorable information pursuant to this Court's 1963 decision in

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The Constitution Project gave 10 days notice to the parties that it intended to file an amicus brief in support of Petitioner, and the parties have consented to the filing of this brief and filed consent letters with the Clerk.

Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. In 2000, TCP convened a Death Penalty Committee that included supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in the criminal justice system. Although the Committee did not take a position on the death penalty itself, it issued recommendations in 2001 and again in 2005 designed to address the inadequate procedural safeguards and lack of fundamental fairness that plague the current administration of the death penalty. Among those recommendations, contained in the report *Mandatory Justice: The Death Penalty Revisited* (2005),[2] the Committee recommended that "prosecutors should provide 'open-file discovery' to the defense in death penalty cases," and if the jurisdiction does not implement an open-file policy, "it is especially critical that the defense be given all favorable evidence (*Brady* material), and that the jurisdiction create systems to gather and review all potentially favorable information from law enforcement and investigative agencies." Mandatory Justice at 95.

TCP convened another committee, the National Right to Counsel Committee, in 2004 to address the crisis facing the nation's indigent defense systems. In 2009, the Committee issued a comprehensive report in which it presented its

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[2] Available at www.constitutionproject.org/manage/file/30.pdf

findings on the ability of state courts to provide adequate counsel to indigent individuals charged in criminal and juvenile delinquency cases who are unable to afford lawyers and made recommendations to ensure the right to counsel. *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, The Report of the National Right to Counsel Committee (Apr. 2009).[3] Among the recommendations, the Committee called on prosecutors in *all* criminal prosecutions, not just capital prosecutions, to "adopt open file discovery policies in order to promote the fair administration or criminal and juvenile justice," noting that such policies protect the right to counsel by "reducing the workload burden on indigent defense providers." *Id.* at 207.

Most recently, in 2012, TCP drafted a *Call for Congress to Reform Criminal Discovery*,[4] outlining changes that Congress should make to federal criminal discovery to prevent future *Brady* violations, including creating a uniform standard across federal districts for what prosecutors must disclose; requiring prompt disclosure of favorable

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[3] *Available at* www.constitutionproject.org/pdf/139.pdf (last accessed Aug. 7, 2012).

[4] *Available at* *www.constitutionproject.org/pdf/Brady_Stmt_030812.pdf* (Mar. 8, 2012).

information to the defense counsel unless a judge rules otherwise; and establishing strong penalties and remedies for non-disclosure. The *Call for Congress to Reform Criminal Discovery* thus far has been endorsed by almost 150 criminal justice system experts, including former federal prosecutors, judges, law enforcement officials and others.

Pursuant to these recommendations within *Mandatory Justice*, *Justice Denied* and the *Call for Congress to Reform Criminal Discovery*, TCP advocates for the robust protection of due process rights pursuant to *Brady v. Maryland* and its progeny. When the Government violates these rights purposely and in bad faith, and a criminal defendant nevertheless prevails, the Hyde Amendment provides a means for the defendant to recoup his or her legal fees. TCP is therefore committed to ensuring that the Hyde Amendment remains a viable and important tool for deterring constitutional violations in the form of serious prosecutorial misconduct. TCP urges this Court to overturn the Eleventh Circuit's opinion in the decision below because it guts the Amendment, rendering it meaningless in contradiction of its plain language, Congressional intent, and case law interpreting the identical statutory language in other contexts.

SUMMARY OF THE ARGUMENT

Congress enacted the Hyde Amendment (the "Amendment") as a unique and necessary measure to protect criminal defendants from prosecutions in which the Government uses unconstitutional and improper tactics to try to obtain a conviction. Unlike constitutional mandates protecting the guilty and innocent alike, the Amendment protects only "prevailing parties," such as those – like Petitioner – who have been acquitted at trial. These vindicated defendants have suffered the expense of defending against prosecutorial misconduct, often including violations of their constitutional rights. This enormous expense can not be recouped except for the Amendment.

The Amendment is designed to compensate for these unnecessary costs. Through an "astoundingly narrow reading" of the Amendment's statutory language, however, the Eleventh Circuit has "rewri[tten] the statute" in such a way that "renders the statute incapable of doing what Congress intended." *United States v. Shaygan*, 676 F.3d 1238, 1246, 1250 (11th Cir. 2012) (Martin, J., dissenting from denial of rehearing *en banc*). The Eleventh Circuit ruled that attorney's fees cannot be recovered under the Amendment even where the "position of the United States" throughout the prosecution is plagued by bad faith constitutional violations, unless the prosecution from its outset was commenced in bad faith. This holding contradicts the plain language of the statute, Congressional intent, and case law interpreting similar statutory language on

which Congress relied when it enacted the Amendment. Indeed, the trial court's findings of prosecutorial bad faith and misconduct in this case are precisely the circumstances meriting an award of attorney's fees under the Amendment.

In rewriting the statute, the Eleventh Circuit has split with other circuits' analysis,[5] and disregards the construction of the phrase "position of the United States" applied by this Court and others to the Equal Access to Justice Act, the statute from which Congress borrowed that language when enacting the Amendment. This circuit split is especially worthy of resolution by this Court given that "[t]he need for certainty and uniformity is more pressing, and the margin for error slimmer, when criminal justice is at issue." *McDonald v. City of Chicago,* 130 S. Ct. 3020, 3094 (2010) (Stevens, J., dissenting).

The fundamental unfairness of this circuit split is evident from the fact that in the First, Fourth, Sixth, and Ninth Circuits, a successful defense against the very same prosecutorial misconduct could be compensated with attorney's fees. When it enacted the Hyde Amendment, Congress did not intend for the Government in one circuit to avoid sanctions for hiding evidence or launching bad faith efforts to disqualify defense counsel on the eve of trial for tactical purposes –

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[5] The circuit split is detailed in Petitioner Shaygan's Brief at 20.

which occurred here – while the Government in another circuit cannot. In addition, TCP is concerned that constitutional rights will not be meaningfully protected, and the Government will not be suitably deterred from prosecutorial misconduct, if the Amendment is given such a crabbed reading.

This Court should take this opportunity to correct the Eleventh Circuit's error of law and to harmonize the circuit courts' interpretation of this important statute aimed at compensating victims of prosecutorial misconduct.

STATEMENT OF THE CASE

In less than three hours of deliberation, a federal jury acquitted Petitioner Ali Shaygan on all 141 counts of the superseding indictment. Subsequently, the district court found that the Government violated Petitioner's constitutional right to exculpatory and impeachment material under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and violated Petitioner's Sixth Amendment right to counsel. Based on this record, the district court held that an award of attorney's fees was justified under the Amendment:

> [T]he position taken by [AUSA] Cronin in filing the superseding indictment; initiating and pursuing the collateral investigation [of witness tampering by defense counsel] based on unfounded allegations; suppressing information about the roles of two key government witnesses as cooperating witnesses in the collateral investigation; and attempting to secure evidence from the collateral investigation that would have jeopardized the trial and severely prejudiced the Defendant, constitute bad faith. These were conscious and deliberate wrongs that arose

> from the prosecutors' moral obliquity and egregious departures from the ethical standards to which prosecutors are held.

United States v. Shaygan, 661 F. Supp. 2d 1289, 1321 (S.D. Fla. 2009) (emphasis added). This finding followed a case marked by extensive prosecutorial misconduct.[6]

A. The Government's Miranda Violation, Petitioner's Successful Suppression Motion, the Government's First Attempted "Deception," and the Government's Retaliatory Superseding Indictment, Motivated by "Ill-Will."

On the day of his arrest, February 11, 2008, Petitioner invoked his constitutional right to counsel but Drug Enforcement Agency ("DEA") agents nevertheless continued to interrogate him after that time. Petitioner later won a motion to suppress the interrogation based on this Miranda violation. Id. at 1295.

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[6] The following summary of the Government misconduct in this case merely highlights the timing and constitutional impact of some of the misconduct in the case but does not attempt to capture all of the Government misconduct identified by the district court.

At a discovery conference on July 31, 2008, AUSA Cronin told Petitioner's counsel that he would face a "seismic shift" in the prosecution if Petitioner continued to pursue his Motion to Suppress the interrogation. *Id.* at 1294. The district court found that "[e]ven if construed narrowly, it is not possible to square the threat with a good faith prosecution of this case." *Id.* (emphasis added).

On August 8, 2008, just one week after the threatened "seismic shift," Magistrate Judge McAliley revealed that the Government had filed a sealed pleading asking the district court "not [to] reveal to the Defendant that there is no" medical report from a doctor. Magistrate McAliley noted that "the problem with the government's request … *is that it would require this Court to engage in deception*." *Id.* at 1296 (emphasis in original).

The Government then issued a superseding indictment, on September 26, 2008, adding 115 counts. The district court found that "strong inferences support that the decision to file the Superseding Indictment was significantly motivated by ill-will." *Id.* at 1298. The court also found that the superseding indictment "greatly increase[d] the time and cost of the trial" and that the additional 115 counts resulted in "additional continuances which kept Dr. Shaygan under strict conditions of house arrest" and "also added to the 'weight' of the indictment and the seriousness of the offenses as presented to the jury." *Id.*

B. The Government's Case "Goes South," and the Government Initiates a Bad Faith Witness Tampering Investigation Against Defense Counsel in Violation of Petitioner's Sixth Amendment Right to Counsel.

Despite the Government's bad faith efforts to overwhelm the defense with 115 additional counts, the case was proceeding well for the defense, and AUSA "Cronin shared [DEA Agent] Wells' concern that his case as a whole was "*going south.*" *Id.* at 1302 (emphasis in original). AUSA Cronin then initiated a witness tampering investigation of Petitioner's defense attorneys. The district court explained:

> the strong inference here is that Cronin was concerned about future contact by the defense team with his two key witnesses, Vento and Clendening. If those two "*went south,*" then so would much of his case, especially the twenty-year enhancement count which hinged on Vento and Clendening's predicate testimony pertinent to Counts 2 through 5 of the Superseding Indictment.

Id. In violation of clear DOJ policy respecting the erection of Chinese walls, Agent Wells continued to participate in both the prosecution and the collateral investigation. Moreover, the district court

"conclude[d] that AUSA Cronin acted, at this stage, with implicit bias, and in bad faith, in participating any further in this collateral matter." *Id.* The district court found that:

> the collateral investigation was unfounded, motivated in part by Cronin's personal animus against the defense team and fueled by his deliberate failure to exercise independent and objective judgment regarding the basis for such an investigation. Indeed, although Wells only expressed concerns that Tucker may be "going south" and that she needed to be "settled down," Cronin unilaterally proceeded to explore the possibility of a "witness tampering" investigation. The pursuit of the collateral investigation further evidenced Cronin's central role in attempting to improperly secure incriminating evidence against the defense team to his advantage.

Id. at 1314.

The district court specifically found that the prosecutors contacted the DEA Agent running the collateral witness tampering investigation "urging progress on the face-to-face contacts with the defense

lawyers and investigators, for the bad faith purpose of seeking to disqualify the defense lawyers for conflict-of-interest immediately prior to trial." *Id.* at 1310 (emphasis added). Thus, the district court found that the Government purposefully and knowingly attempted to deprive Petitioner of his Sixth Amendment right to counsel. The court explained, "[t]he Eleventh Circuit has held that a defendant is deprived of her Sixth Amendment right to competent counsel where her counsel at the time of trial was under investigation by the same United States Attorney's office." *Id.* at 1314 (citing *United States v. McLain,* 823 F.2d 1457, 1463–64 (11th Cir. 1987)) (further citation omitted).

C. The Government's *Brady*, *Giglio*, and Jencks Act Violations.

In furtherance of its bad faith collateral investigation, the Government enlisted its two key witnesses as confidential informants and asked them to tape telephone calls with defense counsel and investigators, which they did. The Government never advised the court or the defense of the witnesses' roles in the tampering investigation. At trial, the Government called them to the witness stand without disclosing that they were informants until one of the informants blurted it out on the witness stand. The district court found that "the failure to provide" a DEA-6 report regarding a call with defense counsel taped by one of the Government's confidential informants "was knowing and in bad faith." *Id.* at 1306. The district court held that "the non-disclosure to the defense or to the

court of the two DEA-6s discussing Vento's recording of his conversation with [defense counsel's investigator] and the establishment of Vento as a confidential informant" were both violations "of the prosecution's obligations under *Brady*." *Id.* at 1316.

In addition the district court held that the Government committed *Brady* violations by failing to provide defense counsel DEA-6 witness interview summaries for four additional witnesses. *Id.* at 1318.

The district court further held that the Government committed *Giglio* violations by failing "to disclose to the defense that Vento and Clendening were cooperating with the government and that Clendening's role in the Shaygan trial was made known to the Judge in Clendening's state court prosecution." *Id.* at 1319.

The severity and willfulness of these *Brady* and *Giglio* violations cannot be underestimated. AUSA Cronin admitted at the sanctions hearing that had Clendening not "blurted that out about the recording," the Government would not have disclosed either the existence of the collateral witness investigation or the fact that Vento and Clendening were confidential informants for the Government. *Id.* at 1310.

ARGUMENT

An award of attorney's fees is appropriate under the Hyde Amendment whenever "the position

of the United States" is in bad faith. By holding that the Amendment "only applies to 'a prosecution brought vexatiously, [frivolously, or] in bad faith'[,]" the Eleventh Circuit improperly narrowed the statute and precluded an innocent defendant from recovering fees despite widespread prosecutorial misconduct during the prosecution phase of the case. *United States v. Shaygan*, 652 F.3d 1297, 1316 (11th Cir. 2011) (emphasis added). The panel opinion thus erroneously "collapses the Hyde Amendment inquiry into a single question: were the charges baseless?" *United States v. Shaygan*, 676 F.3d 1238, 1250 (11th Cir. 2012) (Martin, J., dissenting from denial of rehearing *en banc*). This incorrect holding contradicts the language of the Amendment, which contains no such limitation. The Amendment's legislative history and case law from this Court and others awarding attorney's fees under other statutes also show that no such limitation was intended.

I. The Plain Language of the Hyde Amendment States that "the Position of the United States" Should be Interpreted Consistent with the Same Language in the Equal Access to Justice Act, Which Includes Litigation Misconduct.

The Hyde Amendment states that "awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [the EAJA codified at] section 2412 of title 28, United States Code." Pub. L. No. 105-119, § 617; 111 Stat. 2440, 2519 (1997). When he introduced the Amendment, Rep. Henry Hyde (R-IL) stated that it merely imported into criminal prosecutions the

attorney's fees provision of the Equal Access to Justice Act because it "occurred to [him], if that is good for a civil suit, why not for a criminal suit?" 143 Cong. Rec. H7791 (Sept. 24, 1997). He explained that "we have had 17 years of successful interpretation of that law."

The relevant portion of the EAJA states:

> [A] court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (emphasis added). Both in its original form and in the text as enacted by Congress, the Hyde Amendment retained the phrase, "the position of the United States," as borrowed from the EAJA. *See* 143 Cong. Rec. H7791 (Sept. 24, 1997); *see also* Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997).

Rep. Hyde reiterated that the language was the same and should be applied in the same way: "This is about as simple a concept as there is. We have had it and we have been satisfied with it in civil litigation. I am simply applying the same situation to criminal litigation." 143 Cong. Rec. H7793 (Sept. 24, 1997) (emphasis added).

Even if Congress and Rep. Hyde had not specifically endorsed the EAJA case law, "[i]n enacting the Hyde Amendment, Congress was presumed to have knowledge of the existing case law … under the EAJA[] because '[i]t is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law,' and 'absent a clear manifestation of intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction.'" *United States v. Holland*, 48 F. Supp. 2d 571, 575 (E.D. Va. 1999) (citing *United States v. Langley,* 62 F.3d 602, 605 (4th Cir. 1995) (en banc)), *aff'd,* 214 F.3d 523 (4th Cir. 2000).

In those seventeen years of interpreting the "same situation" under the EAJA, the Circuit Courts of Appeals consistently held that the "position of the United States" is not limited to the initial decision to bring the case. Instead, the "position of the United States" could result in an award of fees solely based on conduct occurring during litigation.

In *Smith by Smith v. Bowen*, 867 F.2d 731, 735 (2d Cir. 1989), the court held that "[i]f it found that the Government's position in any segment of

the litigation was not substantially justified, it should have awarded fees for the time spent by Smith's counsel in successfully opposing the Government's position in that segment." There, the Social Security Administration ("SSA") denied disability benefits to an applicant with downs syndrome. The Second Circuit held that even though the SSA was justified in denying benefits, an award of attorney's fees was appropriate for the applicant's "time spent overcoming unreasonable legal maneuverings by the Government during the litigation in federal court." *Id.* at 735. The court explained:

> In defending an agency decision, even a reasonable one, the Government should be discouraged from engaging in dilatory or otherwise unacceptable litigation tactics. Left unchecked, these litigation practices might discourage future parties from challenging adverse agency decisions. Such a result would run counter to the EAJA's basic purpose of encouraging citizens to vindicate their rights.

Id.; *see also United States v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996) (fees not justified in this case but "there may well be situations in which the government is justified initially but its subsequent unjustified actions merit an award of attorney's fees for the unjustified portion of the conduct"); *Porter v.*

Heckler, 780 F.2d 920, 922 (11th Cir. 1986) (noting that although the Government was justified initially in bringing the case, subsequent unjustified litigation conduct subjected the Government to an award of fees under EAJA).

II. This Court and Other Federal Courts Have Long Held that Attorney's Fees Can be an Appropriate Remedy for Severe Litigation Misconduct.

In other contexts, this Court has repeatedly held that "'bad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 766 (1980) (quoting *Hall v. Cole*, 412 U.S. 1, 15 (1973)).[7] In *Roadway Exp.*, the Court

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[7] *See also Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 772 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1784 (2011) ("It is well-settled that a prevailing defendant may obtain attorneys' fees if the plaintiff litigated in bad faith."); *Towerridge, Inc. v. T.A.O., Inc.,* 111 F.3d 758, 768 (10th Cir. 1997) ("bad faith occurring during the course of litigation that is abusive of the judicial process indisputably, at the discretion of the court, warrants sanction through the charging of fees"); *McLarty v. United States*, 6 F.3d 545, 549 (8th Cir. 1993) ("[t]he court may consider conduct both during and prior to the litigation"); *Int'l Union of Petroleum & Indus. Workers v. W.. Indus. Maintenance, Inc.,* 707 F.2d 425, 428 (9th Cir. 1983) ("bad faith supporting an award of attorneys' fees may be found in conduct that led to the lawsuit or in conduct occurring during the course of the action") (citing *Hall v. Cole,* 412 U.S. 1, 15 (1973)).

remanded the case to the district court to determine whether "counsel's conduct in this case constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers." *Id.* at 767. In issuing that remand, this Court noted that the counsel sanctioned by the district court had violated multiple discovery orders and "showed no greater respect for the orders of the District Court than for the requests of their adversaries." *Id.* at 755.

Thus, this Court has specifically recognized that discovery violations, on their own, can amount to bad faith justifying attorney's fees, and it specifically recognized that the finding of bad faith properly resides with the district court. In enacting the Amendment, Congress did not show any intention of departing from this precedent. Nevertheless, the panel opinion of the Eleventh Circuit in this case, which examines solely whether the Government initiated the case in bad faith, contradicts this authority.

III. Federal Courts Routinely Hold that Government Violations of Criminal Defendants' Constitutional Discovery Rights Can Taint the Government's Entire Litigation Position.

Congress understood when it passed the Hyde Amendment that prosecutorial misconduct such as discovery violations can taint the entire position of the United States. In fact, courts within and outside

the Eleventh Circuit, often view such discovery conduct as sufficient to dismiss the entire case.

Courts in the Eleventh Circuit have long held that the infringement on constitutional rights under *Brady* and *Giglio* can taint an entire prosecution and require dismissal of charges with prejudice, even where the charges themselves were initially justified. *See United States v. Lyons*, 352 F. Supp. 2d 1231, 1251 (M.D. Fla. 2004); *United States v. Dollar*, 25 F. Supp. 2d 1320, 1331-32 (N.D. Ala. 1998); *United States v. Sterba*, 22 F. Supp. 2d 1333, 1338-39 (M.D. Fla. 1998).

Courts in other circuits take the same position. In *United States v. Chapman*, 524 F.3d 1073, 1090 (9th Cir. 2008), the Ninth Circuit upheld the trial court's dismissal of the indictment with prejudice when the prosecution failed to turn over notes and memoranda of the case agent, and conviction records of several prosecution witnesses, in violation of *Brady* and Jencks Act obligations. 524 F.3d at 1084-85. The Ninth Circuit endorsed the trial court's view that these omissions, combined with misrepresentations to the court that it had fulfilled its discovery obligations showed that the prosecution had acted "flagrantly, willfully, and in bad faith." *Id.* at 1078, 1085. This misconduct so fatally tainted the entire prosecution that a mistrial might unacceptably allow the prosecution to salvage what was a fundamentally flawed prosecution; the only way to protect the defendants from substantial prejudice was to dismiss the indictment with prejudice. *See id.* at 1087*; see also, e.g.*, Order

Granting Motion to Dismiss Indictment at 2, *United States v. Noriega, et al.,* No. 10-cr-01031 (C.D. Cal. Dec. 1, 2011) (ECF No. 665) (overturning guilty verdicts and dismissing the indictment with prejudice was the only remedy for multiple *Brady* violations); *United States v. Fitzgerald,* 615 F. Supp. 2d 1156, 1159-63 (S.D. Cal. 2009) (unintentional failure to turn over *Brady* materials is within the range of flagrant prosecutorial misconduct that justifies dismissal of indictment with prejudice); Order Dismissing Indictment, *United States v. Castillo et al.*, No. 01-cr-10206 (D. Mass. Apr. 22, 2002) (ECF No. 172) (failure to disclose important impeachment evidence in succeeding trial actions required dismissal with prejudice) *reported in United States v. Jones*, 609 F. Supp. 2d 113, 132 (D. Mass 2009); *United States v. Ramming,* 915 F. Supp. 854, 857, 868-69 (S.D. Tex. 1996) (where government withheld contradictory and damaging grand jury testimony, court granted motions of acquittal and to dismiss, foreclosing any future prosecution).

The Government's misconduct in the present case was at least at the level of the misconduct in these cases, if not greater. If the Government's misconduct in how it prosecuted the above cases can merit the dismissal with prejudice of the entire case, then such misconduct also must satisfy the Hyde Amendment's requirement that the "position of the United States" be in "bad faith."

IV. The Legislative History Shows That Congress Specifically Intended to Make Litigation Misconduct Actionable Under the Hyde Amendment.

In addition to contradicting its own definition of bad faith, the Eleventh Circuit's error also contradicts Congress' intent. In the floor debate of the Hyde Amendment, Rep. Hyde made clear that "the position of the United States" includes discovery violations. He included within the kinds of prosecutorial misconduct justifying an award of attorney's fees instances where prosecutors:

- "[K]eep information from you that the law says they must disclose."
- "[H]ide information."
- "[D]o not disclose exculpatory information to which you are entitled."

143 Cong. Rec. H7791 (105th Congress). No Representative disagreed. The day after Rep. Hyde's floor statements, the Amendment passed the House by a 340 to 84 vote. 143 Cong. Rec. H20157-58 (daily ed. Sept. 25, 1997). When the final version of the bill passed, neither the joint House and Senate conference nor any individual legislator contradicted Rep. Hyde's earlier statements.

Rather, the conference report stated that attorney's fees can be awarded to acquitted criminal defendants notwithstanding "a grand jury finding of

probable cause to support an indictment." H.R. Rep. No. 105-405, at 194 (1997). This is entirely consistent with case law holding that severe *Brady* violations can taint the entire prosecution and justify dismissal of the charges with prejudice, notwithstanding the fact that probable cause existed to bring the charges initially. Courts issuing these *Brady* opinions, and Congress when enacting the Amendment, understood that such severe violations of defendants' due process rights can transform an entire prosecution initially brought in good faith into one that has been litigated in bad faith.

V. The Hyde Amendment is an Important and Necessary Tool to Compensate Prevailing Defendants for the Expense of Overcoming Government Misconduct and to Deter Such Misconduct.

The Hyde Amendment was enacted "to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority." *United States v. Claro*, 579 F.3d 452, 466 (5th Cir. 2009). The Eleventh Circuit's standard for the Hyde Amendment frustrates that purpose. Under the Eleventh Circuit's standard, the Hyde Amendment would not apply to prosecutions, like Petitioner's, that are marked by extensive misconduct and violations of constitutional rights. Although the majority of prosecutors comply with their obligations to disclose information to the defense pursuant to *Brady* and its progeny, *Brady* violations do occur with some frequency in federal

criminal prosecutions.[8] The Hyde Amendment is therefore a necessary and important tool to redress and deter these frequent constitutional violations.

Most importantly, for defendants who prevail in their defense despite *Brady* violations and

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[8] A 2010 USA Today investigation of federal appellate decisions reported 201 cases since 1997 involving misconduct, 86 of which involved the withholding of evidence that prosecutors were legally required to disclose. Justice in the Balance, *available at* http://projects.usatoday.com/news/2010/justice/cases/ (last visited Aug. 7, 2012).

A 2003 study by the Center for Public Integrity covering a 30-year span found 2012 cases in which an appellate judge had found prosecutorial misconduct worthy of a dismissal, sentence reduction, or reversal. Methodology, The Team for Harmful Error (June 26, 2003), *available at* http://www.iwatchnews.org/2003/06/26/5530/methodology-team-harmful-error.

A 2010 Veritas Initiative report that examined California state and federal cases identified 707 cases in California from 1997 to 2009 in which a court made an explicit finding of prosecutorial misconduct; in 159 of the 707 cases, the court determined that the misconduct was "harmful," and thus grounds for reversal, dismissal, a sentence reduction or other relief. Kathleen M. Ridolfi, et. al., Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009 (2010), N. Cal. Innocence Project, *Available at* http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online%20version.pdf.

Government misconduct, the Hyde Amendment is the only remedy available to them to recoup some of the expense of defending the charges because "common-law personal tort liability and personal tort liability under 42 U.S.C. § 1983 have been explicitly rejected by the Supreme Court" *See* David Keenan et al., The Myth of Prosecutorial Accountability After *Connick v. Thompson*, 121 Yale L.J. Online 203, 213 (2011); *see also Imbler v. Pachtman*, 424 U.S. 409, 422-24 (1976) (reaffirming rule of common-law absolute immunity for prosecutors and extending to § 1983 actions absolute immunity for prosecutorial functions, including non-disclosure of exculpatory evidence).

In addition to compensating prevailing defendants, the Hyde Amendment also serves as an important deterrent to prosecutorial misconduct. Although there are other avenues for deterrence in theory, many of them are not used in practice. Indeed, state bar associations do not robustly enforce the rules against prosecutors. *See* The Myth of Prosecutorial Accountability at 213-20 (recounting studies showing that professional ethics rules requiring prosecutors to comply with constitutional discovery requirements are rarely enforced). Based on the limited publicly available information, disciplinary actions by the Department of Justice's (the "DOJ") Office of Professional Responsibility (the "OPR") are no more common and are limited in their deterrent effect anyway. *See* Annual Report of the Office of Prof'l Responsibility, U.S. Dep't of Justice (2011) (reporting that of 1381 complaints received

during 2011, initial inquiries were only made into 149 complaints—15% of which involved *Brady* or other discovery violations—and full investigations launched for only 20 complaints—3.8% of which involved *Brady* or other discovery violations);[9] *see also* Christopher R. Smith, *I Fought the Law and the Law Lost: The Case for Congressional Oversight Over Systemic Department of Justice Discovery Abuse in Criminal Cases*, 9 Cardozo Pub. L. Pol'y & Ethics J. 85, 91-96 (2010) (discussing the rarity of OPR finding prosecutorial misconduct deserving of disciplinary action).

In the words of Chief Judge Mark L. Wolf of the District of Massachusetts, the "Department's performance in" investigating allegations of prosecutorial misconduct "raises serious questions about whether judges should continue to rely upon the Department to investigate and sanction misconduct by federal prosecutors." Order attaching letter from Judge Wolf to Attorney General Holder at 2, *Ferrara v. United States*, Civ. No. 00-11693 (MLW) (Apr. 28, 2009) (Dkt. No. 275). Judge Wolf noted in response to a finding that a line AUSA in the District of Massachusetts engaged in "extreme and intentional misconduct found by me and the First Circuit," the AUSA was issued a "secret written reprimand" despite being "publicly praised" by the United States Attorney for the District of Massachusetts, both before and after the reprimand was issued. *Id.*

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[9] *Available at* http://www.justice.gov/opr/annualreport2011.pdf.

The DOJ has taken steps to address the problem of Brady violations internally, creating a working group to review discovery practices and increasing training for prosecutors.[10] Despite the DOJ's efforts, however, the *Brady* violations persist. Indeed, just one week before the filing of this brief, the Second Circuit vacated a conviction after concluding "that the government's failure to disclose portions of … transcripts violated *Brady* and that these *Brady* violations undermined confidence in the jury's verdict." *United States v. Mahaffy,* 09-5349-CR L, 2012 WL 3125209 (2d Cir. Aug. 2, 2012).

In another recent example, one year after the DOJ's reforms were instituted, a district court judge in the Central District of California vacated the conviction of the Lindsey Manufacturing Company and two of its executives for violations of the Foreign Corrupt Practices Act. The judge found that the government had committed extensive misconduct at trial and "recklessly failed to comply with its discovery obligations." *See* Order Granting Motion

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[10] *See* Mem. From David W. Ogden, Deputy Attorney General, on Issuance of Guidance and Summary Actions to Dept. Prosecutors (Jan. 4, 2010), *available at* http://www.justice.gov/dag/dag-memo.html; *see also* Deputy Attorney General James M. Cole testifies Before the Senate Judiciary Committee (June 6, 2012), *available at* http://www.justice.gov/dag/discovery-guidance.html; http://www.justice.gov/iso/opa/dag/speeches/2012/dag-speech-120606.html.

to Dismiss, *United States v. Noriega*, 2:10-cr-01031 (C.D. Cal. Dec. 1, 2011) (Docket No. 665).

In such an environment where *Brady* violations persist, finding the Hyde Amendment inapplicable to multiple intentional *Brady* violations would remove an important deterrent for misconduct.

CONCLUSION

From start to finish, the Government engaged in bad faith violations of Petitioner's constitutional rights. This case fits the archetype envisioned by Rep. Hyde: a defendant prevails at trial notwithstanding the Government's bad faith discovery violations in which it fails to disclose information it was constitutionally mandated to disclose. If this case does not merit an award of attorney's fees under the Amendment, it is difficult to imagine any case that could.

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