No. 12-44

IN THE

Supreme Court of the United States

ALI SHAYGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae the National Association of Criminal Defense Lawyers (NACDL) is a nonprofit, professional bar association representing public defenders and private criminal defense lawyers across the nation. Founded in 1958, NACDL has a direct national membership of more than 10,000 attorneys and more than 40,000 affiliate members from all fifty states. NACDL's missions are to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice and the defense of individual liberties. NACDL has participated as amicus curiae in many of this Court's most significant criminal cases.

NADCL's daily experience with the criminal justice system leads it to conclude that the Eleventh Circuit's reading of the Hyde Amendment has gravely undermined one of the few available checks against prosecutorial abuse in the criminal justice system. The Eleventh Circuit's interpretation reads "bad faith" out of the statute, limiting the reach of the Hyde Amendment to cases where a prosecution is so lacking in factual support as to be frivolous—a reading that effectively allows prosecutors to bring charges, even if barely supported in fact, for impermissible and even unconstitutional reasons, and also allows prosecutors to en-

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[1] Counsel of record for both parties received timely notice of the intent to file this brief and letters consenting to the filing have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amicus, its members, or their counsel made a monetary contribution to the preparation or submission of this brief.

gage in discovery violations that impair the truth-seeking function of the criminal trial. Even if the defendant is ultimately acquitted, or has his conviction overturned on appeal, he will have suffered the grave personal anguish and, in many cases, ruinous financial consequences of having been subjected to an improper criminal prosecution. NACDL submits that this Court's review is needed to ensure that the Hyde Amendment remains effective, as Congress intended it, as a deterrent to and remedy for abusive prosecutorial conduct.

SUMMARY OF ARGUMENT

The court of appeals' reading of the Hyde Amendment—that attorney's fees are available to an acquitted defendant only when the government instituted the prosecution without probable cause—will seriously undermine the effectiveness of that law as a deterrent to and remedy for prosecutorial abuse. Congress intended to allow acquitted defendants to recover some of the financial damage from facing a criminal prosecution when the position taken by the government during the prosecution is shown to be "vexatious, frivolous, or in bad faith." The concept of "bad faith" surely includes situations where the government adds numerous charges for an illegitimate reason, such as retaliation for exercising a constitutional right, or engages in discovery abuse. But the court of appeals' decision eliminates virtually any remedy for such misconduct.

From the moment a criminal indictment is filed until such time as a verdict is delivered, federal prosecutors enjoy wide latitude in how they discharge their duties. With such power, however, comes opportunity for abuse. Congress recognized the devastating effects abusive prosecutions can have on an individual's pro-

fessional reputation as well as his financial well-being, and enacted the Hyde Amendment to allow acquitted defendants the opportunity to recover attorney's fees where they are able to prove the government's position was taken vexatiously, frivolously, or in bad faith. Given that prosecutors are personally immune from civil liability for their prosecutorial decisions and are rarely prosecuted or subject to bar discipline for prosecutorial misconduct, the Hyde Amendment provides a much-needed deterrent to and remedy for prosecutorial misconduct.

But the Eleventh Circuit adopted an "astoundingly narrow" view of the statute, collapsing the three independent grounds for relief into but a single inquiry: were the charges filed against the defendant baseless? Where the answer is no, the Eleventh Circuit would deny relief regardless of how abusive a prosecution might have been. That reading is inconsistent with the statute's plain text and legislative history, case law interpreting that statute, and related language in the Equal Access to Justice Act. More importantly, the Eleventh Circuit's reading undermines an important check against prosecutorial misconduct, which remains a chronic problem for which—even when detected—few effective remedies exist.

ARGUMENT

I. THE AVAILABILITY OF FEE AWARDS UNDER THE HYDE AMENDMENT IS A NEEDED CHECK AGAINST PROSECUTORIAL MISCONDUCT

Despite decades of teaching from this Court about the special role of the prosecutor in seeking justice rather than obtaining victory at all costs, prosecutorial misconduct unfortunately remains a serious problem in the criminal justice system. In part this is because the

legal system has devised few effective legal sanctions for such misconduct. Separation of powers principles largely prevent the courts from second-guessing prosecutors' decisions to bring charges, trusting that the judgment as to whether those charges were properly brought will ultimately be made by the jury. *See United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (observing that a "presumption of regularity supports" prosecutors' decisions and "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties" (internal quotation marks omitted)); *Wayte* v. *United States*, 470 U.S. 598, 607 (1985) ("[T]he decision to prosecute is particularly ill-suited to judicial review."). And while prosecutorial misconduct at trial may on occasion result in the overturning of a guilty verdict on appeal, the accused will nonetheless have been forced to suffer the agonizing experience of a criminal prosecution, surely one of the most terrifying experiences that persons in our society might undergo.

Before the Hyde Amendment, innocent individuals who had suffered significant financial and personal harm because of prosecutorial abuse of power were left with virtually no remedy. The Hyde Amendment sought to curb prosecutorial misconduct and protect innocent defendants by allowing for the recovery of attorney's fees for acquitted defendants where the position of the United States was vexatious, frivolous or in bad faith. As such, it provides a critical check against prosecutorial misconduct, particularly bad faith prosecutions.

A. Prosecutorial Misconduct Remains A Persistent Problem That Threatens The Integrity Of The Criminal Justice System

This Court has made clear time and again that "[p]rosecutors have a special duty to seek justice, not merely to convict." *Connick* v. *Thompson*, 131 S. Ct. 1350, 1362 (2011) (internal quotation marks omitted); *see also Berger* v. *United States*, 295 U.S. 78, 88 (1935) (the government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done"). Most prosecutors are undoubtedly conscientious in this regard. However, the pressures to obtain convictions and the lack of meaningful checks on prosecutors' discretion continue to make prosecutorial misconduct a persistent problem.[2]

Although there are few comprehensive studies on prosecutorial misconduct—perhaps reflecting the fact that such misconduct is, in amicus' experience, both systematically underreported and rarely pursued (since there are few effective remedies for it)—the studies

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[2] Smith, *I Fought the Law and the Law Lost: The Case for Congressional Oversight Over Systemic Department of Justice Abuse in Criminal Cases*, 9 Cardozo Pub. L. Pol'y & Ethics J. 85, 87-91 (2010) (highlighting several recent high-profile cases of prosecutorial misconduct, including the serious discovery abuse in the trial of former Senator Ted Stevens, the consideration of sanctions against a federal prosecutor for allowing a police officer to lie on the stand, and the acquittal in a criminal environmental case in which the prosecutors failed to disclose evidence of the relationship between the star prosecution witness and the prosecution and his prosecutorial immunity status); *see also* Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 Charleston L. Rev. 1, 9 (2009) (noting pressures on prosecutors to obtain convictions, including media and political pressures).

that do exist indicate that it remains a significant problem. For example, according to an Innocence Project review, 65 of the first 255 cases in which a convicted person was exonerated based on DNA evidence involved appeals and/or civil lawsuits alleging prosecutorial misconduct; the court found prosecutorial error in nearly half of those cases, and in 18%, the error was significant enough to warrant reversal. West, Innocence Project, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases* 1 (Aug. 2010), *available at* http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf.[3] Similarly, a study by the Center for Public Integrity found that, in 2,012 cases from 1970 to 2003, "appellate court judges reversed or remanded indictments, convictions or sentences due, in whole or in part, to prosecutorial misconduct." Center for Public Integrity, *Methodology, The Team for Harmful Error*, *available at* http://www.iwatchnews.org/2003/06/26/5530/methodology-team-harmful-error (last updated Aug. 4, 2011).[4] In 513 additional cases, appellate judges found the prosecutorial miscon-

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[3] A more recent study based in California yielded consistent results. Specifically, the Northern California Innocence Project identified 707 cases between 1997 and 2009 in which courts explicitly found that prosecutorial misconduct had occurred. Ridolfi & Possley, N. Cal. Innocence Project, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, at 2 (2010), *available at* http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online%20version.pdf. In 159 of those cases, the courts deemed the misconduct serious enough to set aside the conviction or sentence, declare a mistrial, or bar evidence. *Id.* at 3.

[4] The Center read a total of 11,452 opinions located primarily by searching electronic legal databases for the search term "prosecutorial misconduct." *Id.*

duct serious enough to warrant additional discussion, with some dissenting judges writing that the misconduct warranted reversal. *Id.*

With respect to discovery abuse involving *Brady* violations, in 1999, the *Chicago Tribune* identified 381 national homicide cases in which *Brady* violations produced conviction reversals. Armstrong & Possley, *The Verdict: Dishonor*, Chi. Trib., Jan. 11, 1999, *available at* http://www.chicagotribune.com/news/watchdog/chi-020103trial1,0,479347.story. Similarly, in 2010, *USA Today* identified 86 cases since 1997 in which judges found that prosecutors had failed to turn over *Brady* material, and documented 201 criminal cases since 1997 in which judges determined that Justice Department prosecutors themselves violated laws or ethics rules. Heath & McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA Today, Sept. 23, 2010, *available at* http://www.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm.

As sobering as these statistics are, the fact that prosecutorial misconduct is underreported means that it is likely much more prevalent. *See* Smith, 9 Cardozo Pub. L. Pol'y & Ethics J. at 91-96 (discussing underreporting of prosecutorial misconduct by the Department of Justice Office of Professional Responsibility); *see also* Brink, 4 Charleston L. Rev. at 19; Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 Yale L.J. Online 203, 209 (2011) ("[E]mpirical problems hamper efforts to provide an accurate assessment of prosecutorial misconduct in the United States.").

Several factors account for this underreporting, including the likelihood that otherwise ethical prosecutors may be hesitant to report on their colleagues and that many cases never reach a stage where the misconduct might be revealed—because, for example, a defendant has accepted a plea bargain. *See* Keenan et al., 121 Yale. L.J. Online at 209-211; *see also* Heath & McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, *supra* p. 7. (stating that although the number of people charged with crimes in federal district courts has almost doubled over the past 15 years, the number whose cases actually go to trial has fallen almost 30%; in 2009, four defendants out of 100 went to trial, while the rest struck plea bargains). But surely one reason why prosecutorial misconduct is underreported is that in most cases there will be no significant sanction for such misconduct, so there is no reason to pursue it. As discussed below, prosecutors are largely immune from civil liability for decisions made in exercising the prosecutorial function; professional sanctions are rarely pursued against prosecutors; and courts ordinarily will not second-guess prosecutors' decisions to bring criminal cases in the first place.

Prosecutorial misconduct, especially misconduct involving withholding of exculpatory evidence or the pursuit of vindictive or bad faith prosecutions, interferes with the truth-seeking goal of the criminal justice system. Prosecutorial misconduct thereby undermines the integrity of the system and increases the risk that innocent people will be imprisoned. It is critical, therefore, that defendants have meaningful ways to deter and remedy such misconduct. The Hyde Amendment, when read properly to apply to bad faith prosecutions as well as prosecutions that are not supported by probable cause, provides an important means to do so.

B. The Hyde Amendment Provides A Needed Check Against Prosecutorial Misconduct Given The Lack Of Other Meaningful Remedies

There are few remedies for prosecutorial misconduct. Prosecutors have long been held immune from civil liability for actions performed in the scope of their prosecutorial duties. *See Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Yaselli* v. *Goff*, 275 U.S. 503 (1927).[5] Although criminal punishment for prosecutorial misconduct is theoretically available, it is almost never pursued in practice. *See* Keenan et al., 121 Yale L.J. Online at 217-218. Finally, while bar and professional discipline procedures do exist, data suggest that prosecutors are rarely sanctioned for their bad acts. *Id.* at 218-219.[6] It is against this backdrop of non-existent or oth-

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[5] This Court recently ruled that, while a district attorney's *office* may be held liable under 42 U.S.C. § 1983 for failure to train its prosecutors, plaintiffs must be able to show a pattern of violations to prevail, a high bar for any private litigant to clear. *Connick*, 131 S. Ct. at 1360.

[6] In searching a national databank of disciplinary actions maintained by the American Bar Association, *USA Today* found only six prosecutors who were disciplined from 1997 to 2010. Heath & McCoy, *States Can Discipline Federal Prosecutors, Rarely Do*, USA Today, Dec. 8, 2010, *available at* http://www.usatoday.com/news/washington/judicial/2010-12-09-RW_prosecutorbar09_ST_N.htm?loc=interstitialskip. Similarly, although the Justice Department's internal ethics watchdog, the Office of Professional Responsibility, completed more than 750 investigations from 2000 to 2010, it found intentional violations in just 68. Heath & McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, *supra* p. 7; *see also* Keenan et al., 121 Yale L.J. Online at 220 (Center for Public Integrity study found prosecutors faced disciplinary action in just 44 of 2,012 appellate cases filed between 1970 and 2003, with seven of these actions eventually being dismissed);

erwise ineffective discipline that the Hyde Amendment was enacted, with the intended goal of filling this gap by providing a means to deter prosecutorial misconduct and protect innocent defendants.

The Hyde Amendment allows "prevailing" criminal defendants to recover attorney's fees and costs where "the position of the United States was vexatious, frivolous, or in bad faith." Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (codified at 18 U.S.C. § 3006A note). In proposing the legislation, Representative Hyde made its remedial purpose clear, and also made clear that the Amendment was not limited to situations where the government instituted charges without any factual support:

> What if Uncle Sam sues you, charges you with a criminal violation, even gets an indictment and proceeds, but they are wrong. They are not just wrong, they are willfully wrong, they are frivolously wrong. They keep information from you that the law says they must disclose. … They do not disclose exculpatory information to which you are entitled. They suborn perjury. … But they lose the litigation, the criminal suit[.] … In that circumstance, … you should be entitled to your attorney's fees reimbursed and the costs of litigation[.] … That, my friends, is justice.

Ridolfi & Possley, *Preventable Error*, *supra* n.3 (review of public disciplinary actions reported in the California State Bar Journal revealed just six out of 4,741 involving prosecutorial misconduct in a criminal case even though the Northern California Innocence Project identified 707 cases during the same time period in which courts explicitly found that prosecutors had committed misconduct).

143 Cong. Rec. H7786, H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde). The Amendment recognizes not only the cost to society of allowing prosecutorial discretion to go virtually unchecked, but also the often ruinous financial cost that a trial imposes on an innocent defendant. In other words, the Amendment provides a means to "repair the [economic] wound" where the prosecutor has pursued a prosecution in bad faith, fails to disclose exculpatory information, suborns perjury or for which the indictment lacked probable cause. *Id.*

Petitioner's case perhaps presents exactly the sort of case that the Hyde Amendment was intended to address—as the district court's factual findings reveal. This is a situation where the prosecution "obtained an indictment"—that is, the government was able to persuade the grand jury that its case was supported by probable cause. And yet the prosecution was profoundly flawed. Petitioner faced intense pressure from prosecutors to plead guilty. When petitioner refused to do so and, in fact, filed a motion seeking to suppress statements taken from him in violation of *Miranda*, prosecutors responded by filing a superseding indictment that added more than 100 counts to the original 23 charged four months before trial. When petitioner still refused to plead guilty, prosecutors initiated a witness tampering investigation involving surveillance of petitioner's attorneys with the apparent expectation of disqualifying his defense team close to trial, thus putting petitioner at a severe disadvantage. And prosecutors deliberately withheld exculpatory evidence, notwithstanding its well-settled obligation to disclose such material to petitioner and the court. Still, and notwithstanding the multiple instances of bad faith prosecutorial misconduct with which petitioner was confronted,

he managed to obtain an acquittal on all counts. But because petitioner cannot seek a remedy for this misconduct by suing the prosecutors who tried him, the Hyde Amendment offers one of the few (if not the only) meaningful avenues of relief available to him.[7]

II. THE ELEVENTH CIRCUIT'S CRAMPED INTERPRETATION WILL CHILL ZEALOUS ADVOCACY, ENDANGERING CRIMINAL DEFENDANTS' SIXTH AMENDMENT RIGHT TO COUNSEL

The Eleventh Circuit's exceedingly narrow interpretation of the Hyde Amendment—that it applies only where the prosecution lacked probable cause for the indictment—removes a critical check on prosecutorial misconduct. Limiting the Hyde Amendment to cases where the indictment lacks probable cause not only ignores the plain text and legislative history of the stat-

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[7] There is no reason to conclude that the Hyde Amendment poses a serious danger of chilling proper prosecutorial decisionmaking and advocacy. As noted by the dissent to the panel majority, the class of individuals afforded a remedy by the Hyde Amendment is small. Statistics kept by the Department of Justice reveal that, from 2000 to 2010, the percentage of defendants who were convicted after trial in a given year ranged from 88.57% to 91.28%. Dep't of Justice, Bureau of Justice Statistics (Defendants in criminal cases closed: Trends, FY2000-2010, Verdict or outcome of trial: All values, Percents), *available at* http://bjs.ojp.usdoj.gov/fjsrc (last visited Aug. 8, 2012); *see also* Pet. App. 59 (noting "the Executive Branch hardly ever loses a criminal prosecution") (Edmondson, J., dissenting). And even for those few defendants who are acquitted, "the Hyde Amendment is not a 'loser pays' law." Pet. App. 60 (Edmondson, J., dissenting). Rather, to establish liability, a prevailing criminal defendant must prove not just that he was acquitted, but that the prosecution was "frivolous, vexatious, or in bad faith"—in other words, that the pursuit of the case fell outside the bounds of proper prosecutorial conduct.

ute (*see infra* Part III), but also seriously undermines the defendant's constitutional right to counsel and the adversarial process.

A defendant's right to be represented by counsel is a "fundamental component of our criminal justice system." *United States* v. *Cronic*, 466 U.S. 648, 653 (1984). This is because attorneys "are the means through which the other rights of the person on trial are secured." *Id.* Moreover, the "adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.'" *Id.* at 656 (quoting *Anders* v. *California*, 386 U.S. 738, 743 (1967)). This adversarial process is key to the truth-seeking goal of our criminal justice system because "partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U.S. 853, 862 (1975).

Prosecutorial misconduct can seriously compromise that process, as this case amply demonstrates. First, the district court—having had the unique and important perspective of presiding over the pretrial and trial processes—determined that the superseding indictment, which added over 100 counts to the original 23 charged, was "significantly motivated by ill-will." Pet. App. 82. The superseding indictment was filed in retaliation for defense counsel's decision to proceed with a (meritorious) motion to suppress certain statements taken from petitioner in violation of *Miranda*. *Id.* 72-73, 81. The district court went on to find that the addition of so many counts was also expressly designed to elicit a guilty plea by "greatly increas[ing] the time and cost of the trial" and "'add[ing] to the 'weight' of the indictment and the seriousness of the offenses as presented to the jury." *Id.* 82.

This kind of conduct poses a profound threat to the integrity of the criminal justice system. As this Court has previously recognized, a prosecutor may not punish a defendant for "exercising a protected statutory or constitutional right." *United States* v. *Goodwin*, 457 U.S. 368, 372 (1982). Where a prosecutor chooses to add more than 100 counts to an indictment four months before trial in retaliation for a defendant's decision to exercise his constitutional rights, a "realistic likelihood of vindictiveness" exists. *Id.* at 373; *see Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974) (presumption of vindictiveness attached when prosecutor substituted higher charge after defendant exercised constitutional procedural right to retrial; prosecutor prohibited from reindicting convicted misdemeanant on felony charge after defendant had invoked a statutory appellate remedy).

Second, the district court found that the prosecutors had initiated an investigation of petitioner's defense team "for the bad faith purpose of seeking to disqualify [the attorneys] for conflict-of-interest immediately prior to trial," and thereby "forc[ing]" petitioner to plead guilty. Pet. App. 107-108. On this point specifically, the district court observed the "lead prosecutor knew that if key defense lawyers for Dr. Shaygan could be disqualified just before the trial, they would have to step down immediately," a "'catastrophic' blow" that prosecutors "hoped[] would 'force' Dr. Shaygan to plead guilty." *Id.* 168-169 (Martin, J., dissent from denial of reh'g en banc); *see also id.* 107-108.

Third, and compounding the problem of pursuing a bad faith investigation of defense counsel, the prosecutors deliberately violated their obligation to disclose exculpatory information to the defense. In violation of both the district court's pre-trial orders and their own obligations under *Brady* v. *Maryland*, 373 U.S. 83

(1963), *Giglio* v. *United States*, 405 U.S. 150 (1972), and the Jencks Act, prosecutors deliberately failed to turn over documents reflecting the recording of the defense team by Drug Enforcement Administration informants (who later appeared at trial as neutral witnesses), as well as the fact that no witness tampering—the alleged trigger for the recording—had occurred. Pet. App. 105-106, 109-110; *see also id.* 165-166 (the prosecution instituted secret tape recordings of defense counsel as part of the witness tampering investigation even though the premise for the investigation was false).

The prosecutors' misconduct here, which the district court found was motivated by a bad faith purpose to disqualify defense counsel on the eve of trial and force a guilty plea, seriously undermined the defendant's right to counsel and the adversarial process. Where a prosecutor seeks to retaliate against defense attorney for zealously representing his client, as happened here when defense counsel sought to suppress statements taken from his client in violation of *Miranda* and refused to negotiate a plea bargain, the justice system "loses its character as a confrontation between adversaries, [and] the constitutional guarantee [of the Sixth Amendment right to counsel] is violated." *Cronic*, 466 U.S. at 656-657; *see also Strickland* v. *Washington*, 466 U.S. 668, 685 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.").

Under the Eleventh Circuit's view, however, none of this matters. The only relevant question under the Hyde Amendment, in that court's view, is whether the indictment was supported by probable cause; prosecutorial bad faith is irrelevant. In so ruling, the Eleventh

Circuit lost sight of this Court's teaching that, while prosecutors "may strike hard blows," they are "not at liberty to strike foul ones." *Berger*, 295 U.S. at 88.

III. The Hyde Amendment Authorizes The Award Of Attorney's Fees Even Where Probable Cause Exists To Support The Filing Of Criminal Charges

The Hyde Amendment sets forth three grounds on which a court may award attorney's fees to an acquitted defendant: where the position of the United States was "vexatious, frivolous, or in bad faith." 18 U.S.C. § 3006A note. The Eleventh Circuit, however, concluded that only one ground was available—where the charges against the defendant were baseless. Pet. App. 154-155. The Eleventh Circuit's "astoundingly narrow" interpretation, (*id.* 170 (Martin, J., dissent from denial of reh'g en banc)), is contradicted by the statute's plain text and its legislative history.

A. The Text And Legislative History Of The Hyde Amendment Support The Conclusion That Attorney's Fees May Be Awarded Even Where Criminal Charges Are Supported By Probable Cause

The plain text of Hyde Amendment does not limit the statute's application to those cases where probable cause to file criminal charges was lacking. Rather, it applies when the position of the United States was "vexatious, frivolous, *or* in bad faith." 18 U.S.C. § 3006A note (emphasis added). By interpreting the Hyde Amendment to apply only where the decision to bring charges was objectively unreasonable (Pet. App. 154-155), the Eleventh Circuit effectively limits the law to cases where the prosecution was "frivolous," leaving no operative room for Congress's express decision to

provide a remedy for a prosecution that was "in bad faith." This construction runs counter to the "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted); *see also United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)).

Nothing in the language of the Hyde Amendment suggests that it should be limited to cases where the charges against the defendant were baseless, and were there any doubt on that point, the legislative history removes it. The legislative history of the Hyde Amendment reinforces that Congress intended to provide relief to acquitted defendants even where the grand jury had found probable cause to indict the defendant. The Conference Report states explicitly what should be clear from the text of the statute: "The conferees understand that a grand jury finding of probable cause to support an indictment *does not* preclude a judge from finding that the government's position was vexatious, frivolous or in bad faith." H.R. Conf. Rep. No. 105-405, at 194 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2941, 3045 (emphasis added). Notably, the conferees made this statement despite implementing several revisions intended to otherwise limit the statute's scope (*e.g.*, requiring a prevailing criminal defendant to show that the government's position was taken "vexatious[ly], frivolous[ly], or in bad faith" rather than requiring the government to show that its position in the prosecution had been "substantially justified").

Moreover, Representative Hyde clearly explained that the Amendment was intended to protect innocent defendants from several kinds of prosecutorial misconduct, including failure to disclose exculpatory information and suborning perjury. 143 Cong. Rec. H7791. These examples of prosecutorial misconduct are of the type that might occur even where the charges are not "baseless." Congress "clearly understood that the presence of probable cause does not, and should not, excuse patterns of gross prosecutorial misconduct." Pet. App. 171 (Martin, J., dissent from denial of reh'g en banc). Limiting the Hyde Amendment to those instances in which the charges were baseless—as the Eleventh Circuit did here—would preclude recovery for many kinds of prosecutorial misconduct that the statute was intended to deter and remedy.

B. The Court's Decision In *INS* v. *Jean* Supports The Conclusion That Fee Awards Are Available For "Bad Faith" Prosecutorial Misconduct Even Where Criminal Charges Are Supported By Probable Cause

The Court's decision in *INS* v. *Jean*, 496 U.S. 154 (1990), the underlying logic of which was relied on by the Eleventh Circuit panel majority, in fact supports the conclusion that the "position of the United States" encompasses not only the decision to bring charges but the prosecution's conduct after doing so.

In *Jean*, the Court was asked to interpret the phrase "the position of the United States" as it was used in the Equal Access to Justice Act (EAJA), which directs courts to award "fees and other expenses" to private parties who prevail in litigation against the United States where the government is unable to prove its position was "substantially justified." 28 U.S.C.

§ 2412(d)(1)(A). Observing that "[a]ny given civil action can have numerous phases," the Court ruled that the EAJA "favors treating a case as an inclusive whole, rather than as atomized line-items." *Jean*, 496 U.S. at 161-162.[8] Following this guidance, several circuit courts have considered the government's prelitigation conduct as well as its subsequent litigation positions in determining whether to issue awards under the EAJA. *See, e.g.*, *Jackson* v. *Chater*, 94 F.3d 274, 278 (7th Cir. 1996) (because the EAJA "does not allow for discrete findings as to [the government's prelitigation conduct and its litigation position], … we must therefore arrive at one conclusion that simultaneously encompasses and accommodates the entire civil action"); *Roanoke River Basin Ass'n* v. *Hudson*, 991 F.2d 132, 139 (4th Cir. 1993) (in deciding whether the government's position in an EAJA case is substantially justified, the court "look[s] beyond the issue on which the petitioner prevailed to determine, from the totality of circumstances,

[8] In 1985, Congress amended the EAJA to add the following definition: "'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings." 28 U.S.C. § 2412(d)(2)(D). Of the amendment, this Court observed that use of the word "position" in the singular "although it may encompass both the agency's prelitigation conduct and the Department of Justice's subsequent litigation positions, *buttresses* the conclusion [based on section 2412(d)(1)(A)] that only one threshold determination for the entire civil action is to be made." *Jean*, 496 U.S. at 159 (emphasis added). That is, this Court believed Section 2412(d)(1)(A), standing alone, provided sufficient support for the conclusion that cases should be viewed as an "inclusive whole" for purposes of determining fee awards under the EAJA.

whether the government acted reasonably in causing the litigation or in taking a stance during the litigation"); *Oregon Natural Res. Council* v. *Madigan*, 980 F.2d 1330, 1332 (9th Cir. 1992) (determining whether the government's position was substantially justified requires considering both "the government's underlying conduct … and its litigation position").

Notably, Congress was not only aware of courts' expansive interpretation of the phrase "the position of the United States" when drafting the Hyde Amendment—which was patterned after the EAJA—but expressly relied on it. 143 Cong. Rec. H7791 (statement of Rep. Hyde) ("[W]e have had 17 years of successful interpretation and reinforcement of [the EAJA]."). And consistent with their analyses of fee awards under the EAJA, circuit courts have considered the government's conduct over a prosecution as a whole in determining the appropriateness of fee awards made under the Hyde Amendment. *See, e.g.*, *United States* v. *Porchay*, 533 F.3d 704, 711 (8th Cir. 2008) (considering government's pre- and post-indictment conduct in analyzing Hyde Amendment claim); *United States* v. *Schneider*, 395 F.3d 78, 87-90 (2d Cir. 2005) (same); *United States* v. *Manchester Farming P'ship*, 315 F.3d 1176, 1185-1186 (9th Cir. 2003) (same); *United States* v. *Knott*, 256 F.3d 20, 31-33 (1st Cir. 2001) (same); *cf.* Pet. App. 56-57 n.10 (district court "justified in finding that the spiteful manner in which the prosecutors conducted this prosecution amounted to the Government's position in this case") (Edmondson, J., dissenting).[9]

[9] That none of the cited circuits found an award under the Hyde Amendment to be appropriate in no way detracts from the fact that, contrary to the Eleventh Circuit, all considered the gov-

These decisions cast serious doubt on the correctness of the Eleventh Circuit's view that all that matters under the Hyde Amendment is whether the original indictment was supported by probable cause. That focus on a single moment in time in the criminal prosecution—the institution of charges—and on a single factor respecting that moment in time—whether those charges had some bare factual support—cannot be reconciled with this Court's explanation in *Jean* and other courts of appeals' recognition that "the position of the United States" requires a wider perspective that examines the government's conduct of the case as a whole. Here, the district court made amply clear that the government's conduct of the case as a whole was so profoundly flawed as to be "in bad faith." Those findings powerfully demonstrate that this is exactly the kind of case for which Congress intended the Hyde Amendment to provide a remedy.

CONCLUSION

The petition for a writ of certiorari should be granted.

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ernment's pre- *and* post-indictment conduct when evaluating the "position" of the United States and none collapsed the inquiry into the single question, as the Eleventh Circuit did, of whether the charges were baseless.

Respectfully submitted.

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