No. 15-10034

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

JAMIE HARMON,

Defendant/Appellant.

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REHEARING AND REHEARING *EN BANC*

Appeal from the United States District Court
for the Northern District of California
The Honorable Lucy H. Koh
United States District Judge
No. 08 Cr. 938 LHK

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CORPORATE DISCLOSURE STATEMENT

Amici are the National Association of Criminal Defense Lawyers and California Attorneys for Criminal Justice. Neither *amicus* issues stock or has a parent corporation.

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INTEREST OF THE *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 including affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

California Attorneys for Criminal Justice ("CACJ") is a nonprofit organization of criminal defense lawyers founded in 1972, with members across the State of California. CACJ works on behalf of criminal defense attorneys to ensure justice and due process for their clients.

The *Amici* share a strong interest in the fair and efficient administration of criminal justice. *Amici* contend that the panel decision here undercuts both the grand jury's historic function to exercise its discretion when deciding whether to hand up an indictment charging an individual with a federal felony, and this Court's, and the district courts' in this circuit, ability to supervise the grand jury and grave prosecutorial misconduct that interferes with the grand jury's independence. So too, *Amici* contend that the panel decision also serves to insulate prosecutorial misconduct, and thus invites future prosecutorial transgressions rather than deterring them.

INTRODUCTION

NACDL and CACJ submit the following arguments to address issues that often remain unresolved when cases raising them are presented for review. Joint *amici*'s purpose here is to underscore that the Court's current approach to this case avoids focus on remedying a problem that members of this Court have acknowledged: misconduct by the Government affecting the structural integrity of a criminal case litigation. This case presents an opportunity for the Court to offer a more substantial and instructive approach here, given the issues presented.

This case involves the tale of two lawyers. One—defendant Jamie Harmon—was indicted for misusing her attorney trust account because she purportedly knew that the money deposited by her client came from illegal activity. The indictment hinged on the extraordinary testimony of her client's business partner who claimed that he, for reasons unknown, confessed his and Harmon's client's misconduct to her. Harmon was convicted, sentenced to prison, and disbarred. The other—prosecutor Richard Cheng—knowingly and intentionally presented false testimony to the grand jury, on three separate occasions, to mislead the grand jury about the business partner's motive to testify and his relationship with the Government. Rather than inform the grand jury that the partner—Yan Ebyam—testified pursuant to a written plea agreement that

required his testimony, remained at risk of further prosecution, and had become a paid informant by the time of his third grand jury appearance, Assistant United States Attorney Cheng repeatedly elicited false testimony to inform the grand jury that Ebyam was testifying voluntarily, without compensation, obligation, or risk of any sort, and solely out of a sense of civic duty.

The district court denied Harmon's pretrial motion to dismiss based on AUSA Cheng's prosecutorial misconduct. A panel of this Court affirmed and held that it was powerless to correct the Government's misconduct because a petit jury subsequently convicted Harmon, and that conviction washed away any prejudice inflicted by the false grand jury presentations. The panel noted that any remedy for AUSA Cheng's misconduct should be directed at "other bodies" like the California State Bar or the Office of Professional Responsibility ("OPR"), but nothing he did affected Harmon's case.

Amici respectfully contend that the panel's conclusions were incorrect. Rather, the history of the grand jury, the importance of the constitutional right to indictment by grand jury, and its critical gate-keeping discretionary function as the

voice of the community, demonstrate that this Court is not powerless to correct the grave misconduct that occurred in this case.[1]

Amici also address the panel's suggestion that extra-judicial sanctions suffice to deter the type of prosecutorial misconduct presented by this case. Respectfully, they do not. In addition, *Amici* note that the panel's approach itself confirms the great need for a judicial remedy by this Court. While the panel suggests that grave misconduct of this stripe can be addressed effectively by referrals to the State Bar or OPR, the panel refused to even name—and thus publicly shame—the offending prosecutor. It instead shielded AUSA Cheng from public reproval for his misconduct by asserting (for reasons less than apparent) that the offending prosecutor is "now [a] former Assistant United States Attorney[.]" In so doing, the panel opinion essentially (mis)named AUSA Grant Fondo as the culprit because Fondo is the *only* Government counsel listed on the district court docket as having left the Government's employ; the docket continues to list Richard Cheng as an AUSA, and notes Fondo's new employment at Goodwin Proctor LLP. Thus, not only does the panel opinion protect rather than

[1]With respect to the history of the grand jury's role, *Amici* here defer to the well-reasoned brief presented by *Amici* Ninth Circuit Federal Public and Community Defenders.

sanction the prosecutor who thrice committed misconduct in this case, it told the world to assign blame to a former prosecutor who did nothing wrong.

The Court should rehear this case.

ARGUMENT

A. This Court can and should grant relief where the Government's misconduct prevents the grand jury from exercising its discretionary function.

The constitutional guarantee of indictment by grand jury serves two critical functions: to ensure that no person is called to stand trial absent a showing of probable cause to believe she committed a crime, and to provide the community discretion on whether to call that person to trial based on its assessment of all the facts and circumstances. *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). *Vasquez* addressed whether misconduct before the grand jury should be corrected following a defendant's trial conviction. En route to holding that it should, as structural error, the Court emphasized the grand jury's discretionary function:

> The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts. Moreover, the grand jury is not bound to indict in every case where a conviction can be obtained. Thus, even if a grand jury's determination of probable cause is confirmed in

> hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come.

Id. (internal quotation and citation omitted).

While *Vasquez* addressed misconduct in the form of exclusion of blacks from the grand jury, its analysis applies equally to misconduct in the form of the knowing presentation of perjured testimony. Substituting "knowing presentation of perjury" for "discrimination" in the Court's analysis proves the point:

> [The State] argues here that requiring [the prosecution] to [re-indict] a defendant, sometimes years later, imposes on it an unduly harsh penalty for a constitutional defect bearing no relation to the fundamental fairness of the trial. Yet [the Government's] intentional [use of perjured testimony] is a grave constitutional trespass, possible only under color of [governmental] authority, and wholly within the power of the [Government] to prevent. [footnote omitted]. Thus, the remedy we have embraced for over a century—the only effective remedy for this violation —is not disproportionate to the evil that it seeks to deter. If [the knowing and intentional use of false testimony before the] grand jury . . . becomes a thing of the past, no conviction will ever again be lost on account of it.

Id.[2]

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[2]The omitted footnote describes how "alternative remedies are ineffectual." *Id*. n.5. It notes that criminal prosecution for discrimination against grand jurors is essentially non-existent, as are civil lawsuits. *Id*. The same can be said for

Vasquez's teachings apply to this case. The grand jury was presented with a difficult question: did respected defense counsel cross the line by accepting and subsequently returning some money from her client that she *knew* came from his criminal conduct. Indicting an attorney who makes her living as an adversary to the very attorneys seeking her prosecution is no light matter. *See United States v. Bonds*, 784 F.3d 582, 585 (9th Cir. 2015) (*en banc*). Here, the grand jury repeatedly probed Ebyam's motivations and relationship with the Government, and demonstrated wariness about Ebyam's extraordinary account. *See e.g.*, Slip Opinion (S.O.) at 5. By blocking the grand jurors' questions and eliciting Ebyam's perjury, AUSA Cheng interfered with the grand jury's discretionary function and secured an indictment where one might not have otherwise issued.

Admittedly, neither Harmon nor anyone else can quantify the effect Ebyam's perjury had on this grand jury. But it is that inability, coupled with the fundamental unfairness the presentation of perjured testimony presents, that makes this error structural. S.O. 11. (structural error "permeates the entire conduct of the

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discipline by the state bars and OPR. *See United States v. Olsen*, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing *en banc*); *Kozinski*, Preface: Georgetown Law Journal's Annual Review of Criminal Procedure, 44 Geo. L.J. Ann. Rev. Crim. Proc. (2015), at xxxii; *see also infra.*, Part B.

proceeding" and "cannot be quantitatively assessed in the context of other evidence") (internal quotations and citations omitted).

Instead of addressing *Vasquez* and its teachings, the panel relied on *United States v. Sitton*, 968 F.2d 947, 953 (9th Cir. 1992), *abrogated on other grounds by Koon v. United States*, 518 U.S. 81 (1996), for the proposition that "dismissal of the indictment is not appropriate when a witness' alleged perjury is not material to the defendant's indictment and instead affects only the witness' credibility." *Amici* respectfully contend that *Sitton* was incorrectly decided, and the Court should rehear this case *en banc* to correct it.

In sum, *Amici* do not understand how a witness's credibility could *ever* be "immaterial[,]" as *Sitton* declares is *always* the case. The substance of a witness's testimony—the part *Sitton* agrees is material—is entirely intertwined with his credibility, *viz*., whether the grand jurors should accept his account. A simple example should suffice:

> Witness A testifies before the grand jury that he saw Suspect Z vandalize a car in a local parking lot. He falsely testifies he has no motive to lie, and that he is "a servant of the truth" based on his strong moral compass. The prosecutor who elicits this testimony knows that the witness has been convicted of perjury in the past and had a prior, physical altercation with Suspect Z. The prosecutor then successfully blocks the grand jurors from learning these true facts by interrupting and re-framing the grand jurors' questions.

According to *Sitton* and the panel, the Government's knowing elicitation of perjured testimony as presented in this hypothetical is immaterial because it only affected "the witness' credibility." This cannot be correct; the perjured testimony goes to the heart of the matter, *i.e.*, how to weigh Witness A's account. Both the grand jury's assessment of his credibility with respect to the critical allegations, *and* with respect to its discretion on whether to charge the Suspect and render him a Defendant, require the honest presentation of evidence. And while the Government's unknowing presentation of false testimony may support a different rule, it cannot be that the Government's intentional presentation of false testimony about the bases for a witness's testimony—especially from its primary witness—can be deemed "immaterial" to the grand jury's deliberations and its exercise of its twin functions.

Amici also contend that the panel opinion gives insufficient weight to *United States v. Lopez-Gutierrez*, 83 F.3d 1235 (10th Cir. 1996) and *United States v. Lombardozzi*, 491 F.3d 79 (2d Cir. 2007). S.O. 12 n.7. While the Tenth Circuit applies *Mechanik*'s[3] harmlessness rule to "technical" or "procedural" grand jury errors, it allows for post-conviction review of more-serious grand jury errors: if "the claimed errors . . . essentially threatened the defendant's rights to fundamental

[3] *United States v. Mechanik*, 475 U.S. 66 (1986).

fairness, the issue is justiciable notwithstanding a subsequent guilty verdict by the petit jury." *Lopez-Gutierrez*, 83 F.3d at 1244-45. These errors include the Government's attempt to "unfairly sway the grand jury[.]" *Id.* at 1245; *see also United States v. Kilpatrick*, 821 F.2d 1456, 1466 (10th Cir. 1987) (permitting appeal to assess claim of prosecutorial misconduct).

The Second Circuit similarly permits dismissing an indictment based on prosecutorial misconduct even after a conviction, requiring that: "to warrant dismissal of an indictment after a conviction, 'the prosecutor's conduct must amount to a knowing or reckless misleading of the grand jury as to an essential fact.'" *Lombardozzi*, 491 F.3d at 79 (alterations and citation omitted).

Contrary to the panel's conclusions, AUSA Cheng's repeated misconduct shielded from the grand jury Ebyam's true motivations: he was trying to please the Government and testified by compulsion tied to his own criminality and potential future prosecution, as opposed to his sense of civic duty, and he even engineered payments from the Government to assist with other prosecutions. Even more important, disclosure of those lies would have given the grand jurors additional pause when assessing the case and the Government's exhortation to indict. In other words, the grand jurors may have decided not to indict Harmon had they learned that AUSA Cheng *and* Ebyam had misled them. Contrary to the panel's

analysis, AUSA Cheng's misconduct violated Harmon's "rights to fundamental fairness[,]" *see Lopez-Gutierrez*, 83 F.3d at 1244-45, and constituted an intentional "misleading of the grand jury as to an essential fact.'" *See Lombardozzi*, 491 F.3d at 79.

B. The panel's shielding of AUSA Cheng's identity demonstrates the non-existent deterrence presented by extra-judicial remedies.

The panel opinion assures us that the prosecutor's misconduct is of no moment in this case, and that extra-judicial remedies like OPR referrals and State Bar inquiries are sufficient to deter prosecutors from committing misconduct as presented here. *Amici* respectfully disagree.[4]

As (then Chief) Judge Kozinski has persuasively explained, prosecutors confront incentives that encourage them to withhold information that would undermine their quest for convictions; at the same time, "[p]rofessional discipline is rare, and violations seldom give rise to liability for money damages." *Olsen*, 737 F.3d at 630 (Kozinski, J., joined by Pregerson, Reinhardt, Thomas and Watford, JJ., dissenting from denial of rehearing *en banc*). Indeed, AUSA Cheng is absolutely immune for damages arising from his misconduct. *See Imbler v.*

[4]Considering the panel's contention that AUSA Cheng has since left the Government, *see* S.O. 10 n.6, its focus on OPR as presenting an appropriate remedial measure seems particularly inapt.

Pachtman, 424 U.S. 409, 423-24 (1976); *Burns v. Reed*, 500 U.S. 478, 490 n.6 (1991) ("There is widespread agreement among the Courts of Appeals that prosecutors are absolutely immune from liability under § 1983 for their conduct before grand juries.").

Amici also agree with Judge Kozinski's assessment of OPR:

> In my experience, the U.S. Justice Department's Office of Professional Responsibility (OPR) seems to view its mission as cleaning up the reputation of prosecutors who have gotten themselves into trouble.

Kozinski, Preface: Georgetown Law Journal's Annual Review of Criminal Procedure, 44 Geo. L.J. Ann. Rev. Crim. Proc. (2015), at xxxii.

Recent publications provide data supporting Judge Kozinski's observations.

One report, from March 2016, investigated court records from 2004 to 2008 in Arizona, California, Pennsylvania, New York, and Texas. Innocence Project, *Prosecutorial Oversight: A National Dialogue in the Wake of* Connick v. Thompson at 12 (2016).[5] The investigators found 660 cases where courts "confirmed prosecutorial misconduct[.]" *Id.* Courts deemed 133 of those cases harmful, yet only one prosecutor was disciplined. *Id.*

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[5]http://www.innocenceproject.org/prosecutorial-oversight-national-dialogue-wake-connick-v-thompson/.

In a 2010 report, the Northern California Innocence Project assessed California cases from January 1997 to September 2009. Ridolfi, Kathleen M.; Possley, Maurice; and Northern California Innocence Project, "Preventable Error: *A Report on Prosecutorial Misconduct in California 1997–2009*" (2010).[6] The report found 707 cases in which courts found that prosecutors committed misconduct, but only six instances where a prosecutor was subject to professional discipline. *Id*. at 1-3, 56.[7] The report also noted that "to date, no California prosecutor has been disbarred for prosecutorial misconduct." *Id.* The report discusses several prosecutors who were found to have committed misconduct multiple times without suffering any public bar discipline. *Id*. at 57-59.

And these studies certainly miss many cases—perhaps the majority of them—where prosecutorial misconduct goes undiscovered. That is especially true in the grand jury context where receipt of confidential grand jury materials is the rare exception. *See* Fed. R. Crim. P. 6(e)(2).

In sum, extra-judicial remedies exist in name only, and do not deter prosecutorial misconduct.

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[6]http://digitalcommons.law.scu.edu/ncippubs/2.

[7]The Innocence Project based its finding on its review of 4,741 disciplinary actions as presented by the *California State Bar Journal*. *Id.* at 1-3, 54.

The panel's treatment of AUSA Cheng's misconduct confirms what prosecutors have come to expect: even established misconduct will be swept under the rug, and the courts will avoid even naming the offender and affecting his "good name" in any way. But the panel's opinion also demonstrates at least one negative consequence of such an approach: the panel, most certainly without intention, implicitly named former Assistant United States Attorney Grant Fondo as the culprit. But Fondo did nothing wrong. *See* S.O. 10 n.6.

The panel opinion never names the offending prosecutor, whom it describes as a "former Assistant United States Attorney who appeared before the grand jury [and] also was part of the trial team." *Id*. It further explains that the Court's "concerns are limited to him[,]" and it absolved "his fellow trial counsel" of the misconduct. *Id*.

But the district court's docket, on the day the panel opinion issued and since, identifies two male prosecutors: Richard Cheng, who is listed as a current Assistant United States Attorney, and Grant Fondo, who has since moved on to Goodwin Proctor LLP.[8] The panel opinion thus misidentified Fondo by shielding

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[8]The docket also identifies AUSA Susan Knight as still with the United States Attorney's Office ("USAO"). Counsel also notes that when he called the USAO last week and asked to speak to AUSA Cheng, he was sent to AUSA Cheng's voicemail, which had an outgoing message from AUSA Cheng. AUSA Cheng's profile at the California State Bar website continues to list him as

Cheng. And that is the lesson to Cheng and all other federal prosecutors: even established misconduct conceded by their Office will not result even in the very least sanction, *viz*., public shaming.[9] These "remedies" are not sufficient to protect the rights of the accused or ensure prosecutorial fidelity to securing grand jury indictments *only* through the honest presentation of evidence.

CONCLUSION

As (then Chief) Judge Kozinski, joined by Judges Pregerson, Reinhardt, Thomas, and Watford, noted in dissent to the denial of rehearing *en banc*:

> There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.

Olsen, 737 F.3d at 626. Such misconduct occurred in this very case. *See* S.O. 12-14. And much worse occurred too. AUSA Richard Cheng, over the course of three grand jury appearances, walked his star witness through a series of falsehoods to overcome skepticism the grand jurors expressed about his account. AUSA Cheng succeeded by introducing knowingly false testimony that Ebyam

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employed by the USAO: http://members.calbar.ca.gov/fal/Member/Detail/135992. So does his LinkedIn profile: https://goo.gl/Q3sypT.

[9]The panel opinion's playful footnotes further undermine the seriousness of the issues presented by this case. *See* S.O. 4 nn. 1 & 2. Indeed, *Amici* respectfully contend that the comparison of Harmon to the fictional attorney who conspired with an unrepentant drug kingpin and serial murderer is inapt, to say the absolute least. *See id*. n.2.

testified based on a sense of civic duty when in truth, he was compelled by the Government to do so, was at risk of further prosecution, and was even paid for his services to the very prosecution team seeking to indict Harmon. Through this appalling misconduct, the Government overcame any trepidations the grand jurors had with Ebyam's extraordinary account, and indicted a practicing defense attorney. Had the grand jurors known the truth, their concerns about Ebyam may have led them to exercise their discretion and return no true bill. That possibility would be even greater if the grand jury learned about AUSA Cheng's machinations and the deceptions he and Ebyam presented.

But, of course, we cannot know this, and no person can accurately quantify the effect AUSA Cheng's misconduct had on this grand jury. And therein lies the problem. Thankfully, in *Vasquez*, the Supreme Court taught us how to respond to errors that cannot be quantified, but that go to the very heart of the fairness of grand jury proceedings: vacate the conviction, strike the indictment, and put the parties back at square one.

Or as the Court expressed:

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his

> actual motivations are hidden from review, and we must presume that the process was impaired. *See Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927) (reversal required when judge has financial interest in conviction, despite lack of indication that bias influenced decisions). Similarly, when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained. *See Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976) (per curiam); *Sheppard v. Maxwell*, 384 U.S. 333, 351–352, 86 S.Ct. 1507, 1516, 16 L.Ed.2d 600 (1966).

Vasquez, 474 U.S. at 263. "Like these fundamental flaws, which never have been thought harmless," *id.*, the knowing and intentional deceit of a grand jury regarding a material witness's testimony, and its effect on the grand jury's discretion to indict, is not amenable to harmless-error review. Rather, it presents a fundamental defect in the functioning of the grand jury, and should be corrected.

The Court should now take the opportunity to offer a more substantial and instructive approach to prosecutorial misconduct before the grand jury. It should rehear this case.

Respectfully submitted,

DATED: October 13, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) & 32 and Ninth Circuit Rule 32-1, the attached *Amicus* Brief is:

> Proportionately spaced, has a typeface of 14 points or more, and contains 3,824 words.

/s/ E A Balogh
Date: October 13, 2016 ETHAN A. BALOGH

STATEMENT OF THE PARTIES' CONSENT

In accordance with Federal Rule of Appellate Procedure 29(a), counsel reports that counsel to Appellant Harmon and the United States have given consent to the filing of this *amicus* brief.

/s/ E A Balogh

DATED: October 13, 2016 ETHAN A. BALOGH

STATEMENT REQUIRED UNDER FED. R. APP. P. 29(c)(5)

In accordance with Federal Rule of Appellate Procedure 29(c)(5), counsel asserts that: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (c) no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

/s/ E A Balogh

DATED: October 13, 2016 ETHAN A. BALOGH

PROOF OF SERVICE

I, Ethan A. Balogh, certify that on the date set forth below, I caused to be filed electronically one copy of this *Amicus* Brief on Appeal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and that all parties to whom I am required to provide service are registered CM/ECF users, and that service of the brief shall be accomplished by the CM/ECF system.

/s/ E A Balogh
Dated: October 13, 2016 ETHAN A. BALOGH