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 OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN SUPPORT OF PETITIONER

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August 9, 2012

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Government is exempted as a matter of law for Hyde Amendment sanctions under the statute's prohibition on "bad faith" prosecutions despite subjective malice in its filing decision and extensive and pervasive prosecutorial misconduct during the course of the litigation, merely because there was probable cause to support the filing of the indictment.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Association of American Physicians & Surgeons, Inc. ("AAPS"), is a national association of physicians. Founded in 1943, AAPS has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has been a

[1] This brief is filed with blanket consent by Petitioner and with written consent by Respondent, and timely notice was provided by *amicus* to the parties in compliance with Sup. Ct. Rule 37.2(a). Pursuant to its Rule 37.6, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

litigant in this Court and in other appellate courts. *See, e.g.*, *Cheney v. United States Dist. Court*, 542 U.S. 367, 374 (2004) (citing *Association of American Physicians & Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993)); *Association of American Physicians & Surgeons v. Mathews*, 423 U.S. 975 (1975). In addition, this Court has expressly made use of *amicus* briefs submitted by AAPS in high-profile cases. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id*. at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). The Third Circuit cited an *amicus* brief by AAPS in the first paragraph of one of its decisions. *See Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006).

AAPS has long opposed expansion in federal prosecutions beyond the original meaning of the U.S. Constitution. In particular, AAPS has been critical of the overzealous federal criminalization of medicine, an issue implicated in this case. *See, e.g.*, Jane M. Orient, M.D., "Health Bill Would Shackle Doctors – Literally," *The Wall Street Journal* A14 (May 30, 1996) (observing how physicians are being denied "the same due process rights as people accused of rape or aggravated assault"). Accordingly, AAPS has a valid interest in this Petition.

INTRODUCTION

The "Hyde Amendment" enables a defendant victimized by federal prosecutorial misconduct to obtain reimbursement of a portion of his costs and expenses from the ordeal. Specifically, the Hyde Amendment adopts the loser-pays model when a federal prosecution is "vexatious, frivolous, or in bad faith." Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes).

Consistent with the checks and balances fundamental to the U.S. Constitution, the Hyde Amendment provides a modest restraint on wrongdoing amid the ever-expanding federalization of crime. State prosecutions have the restraints of meaningful public accountability, including direct elections, but federal prosecutions do not. When this unchecked power is abused, the Hyde Amendment offers at least a glimmer of hope for the victim.

Yet the ruling by the Eleventh Circuit below removed even this modicum of protection against many types of vindictive, politically motivated or racist conduct by prosecutors. In a case where a publicity-driven prosecution of a minority physician fell apart in Florida, the prosecution refused to accept the developing facts, instead piling on unjustified allegations and engaging in extensive wrongdoing to seek a preordained goal. The prosecution became a mockery of the Rule of Law rather than an earnest effort to uphold it, as the lead prosecutor broke rules with impunity in order to impose a mandatory prison sentence of 20 years against a man found by the jury to be not guilty of any of it.

Without a need for extensive deliberations, the jury rendered its verdict of acquittal of the defendant physician on all 141 counts. The trial judge, appalled by the prosecutorial misconduct, properly applied the Hyde Amendment to award attorneys' fees to the defendant based on proven, well-documented wrongdoing by the prosecution. This award, roughly $600,000, is barely a fraction of the real hardship imposed by such a prosecution, which demanded a mandatory minimum of 20 years in prison for an innocent man.

But on appeal, a 2-1 panel of the Eleventh Circuit substituted its view of the facts for that of the jury and trial judge, recasting implausible, rejected allegations as though they were true and significant. *United States v. Shaygan*, 652 F.3d 1297, 1302, 1305-06 (11th Cir. 2011) (Pet. App. 5, 12-16). Remarkably, the panel focused its concern on the "civil rights" of the prosecutors found by the trial judge to have engaged in extensive wrongdoing. 652 F.3d at 1301. The panel tossed out the entire award and with it the ability of future defendants to invoke the Hyde Amendment against most types of prosecutorial misconduct. *Id.* at 1317 (Pet. App. 40-41). The result is a blank check for federal prosecutors which is inconsistent with the checks and balances fundamental to our constitutional framework. Compelling dissents from the subsequent denial of a petition for rehearing followed.

Each Term this Court considers and establishes extensive protections for criminal suspects, which of course can result in the guilty going free, in order to deter investigatory misconduct. *See, e.g., United States v. Jones*, 132 S. Ct. 945, 954 (2012) (finding a

Fourth Amendment right with respect to GPS monitoring). It is overdue to consider a case where the innocent was victimized by official misconduct. The evisceration by the court below of a congressional enactment – the Hyde Amendment – merits review by this Court. Where, as here, allegations for a prosecution fall apart during a case, penalties are essential to deter prosecutors from continuing to pursue it with a vengeance. It was an error of national significance for the Eleventh Circuit to remove the modest safeguard of the Hyde Amendment for the unjustly prosecuted.

SUMMARY OF ARGUMENT

James Madison and the other Founders would not recognize the vast, unchecked power of federal prosecutors today. Federal prison sentences of 20 years and longer are now routinely imposed, despite a lack of proof of *mens rea* that is typically required in state court, and without this Court even considering this growing problem. Issues that could be easily and inexpensively handled by revoking a license to do business or practice medicine are transformed into highly destructive games of "gotcha", with the ends justifying the means for the prosecution. This unchecked government power has caused the federal criminal justice system to stray far from its constitutional moorings.

It is customary to blame Congress for this widely criticized trend of the federal criminal justice system, but Congress did apply brakes to this runaway power in the form of the Hyde Amendment. Though not used as often as it could be, the Hyde Amendment is

an essential deterrent to official wrongdoing in a system lacking any other external accountability. One can hardly doubt that prosecutorial misconduct occurs at both the state and federal levels, but the state criminal justice system has many forms of protection lacking at the federal level for such overreaching. Federal courts should not take away the little protection that does exist, and the Eleventh Circuit below erred in shutting down the Hyde Amendment where it is sometimes needed most.

In so holding, the ruling below departs from the checks and balances inherent in the Constitution. If men were angels, then the lack of restraints would not be a problem, but James Madison famously observed in urging ratification of the Constitution that not all men are angels and thus checks and balances are essential. The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("[Y]ou must first enable the government to control the governed; and ***in the next place oblige it to control itself***.") (emphasis added). The Hyde Amendment provides an essential, albeit modest, level of accountability for prosecutorial misconduct, and it should be fully upheld and applied.

Due to the compelling need for a deterrent against occasional wrongful conduct by federal prosecutors, the Petition should be granted to consider and reverse the Eleventh Circuit decision below.

ARGUMENT

I. EVER-EXPANDING FEDERAL LAW ENFORCEMENT REQUIRES MORE EXTERNAL ACCOUNTABILITY, NOT A NARROWING OF THE HYDE AMENDMENT.

"[F]or the past generation, virtually everyone who has written about federal criminal law has bemoaned its expansion," and yet "the expansion has continued apace …." William J. Stuntz, "The Pathological Politics of Criminal Law" [hereinafter, "*Stuntz*"], 100 Mich. L. Rev. 505, 508 (Dec. 2001). Part of the blame can be placed on Congress, which continues to enact a dizzying and growing array of new federal crimes. *See, e.g.*, *United States v. Wells*, 519 U.S. 482, 505 (1997) (Stevens, J., dissenting) ("[A]t least 100 federal false statement statutes may be found in the United States Code."). But where Congress *has* enacted a deterrent against overzealous federal prosecution, as embodied in the Hyde Amendment, it is imperative for courts to fully honor that check on power.

The decision below did the opposite, holding that the trial judge was wrong, the jury was implicitly wrong, the plain meaning of the Hyde Amendment is wrong … and that a rogue federal prosecutor can essentially do no wrong. The same prosecutor whom the panel below was so solicitous in protecting was meanwhile arrested for reportedly swimming in his boxer shorts at a public establishment, thereby exposing himself to a young girl, and for subsequently resisting arrest.[2]

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[2] "According to the arrest form, the girl and her mother told Miami police that Cronin's genitalia were exposed as he got out

By categorically excluding most prosecutorial misconduct from the accountability of the Hyde Amendment, the Eleventh Circuit decision exacerbates the trend of shifting adjudicatory power into the hands of federal prosecutors:

> As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; ***law enforcers, not the law, determine who goes to prison and for how long***. The end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys' offices and police departments.

Stuntz, 100 Mich. L. Rev. at 509 (emphasis added). While state prosecutors remain accountable to the voting public, the increased concentration of power in federal prosecutors continues without any meaningful check. For the prosecutors who do not qualify as James Madison's figurative angels, the result is wrongdoing that the Hyde Amendment was plainly enacted to deter.

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of the pool. 'The victim's mother, who also witnessed the incident, then covered her daughter's eyes,' the form said." Jay Weaver, "Federal Prosecutor Charged with Lewd Conduct," *Miami Herald* B3 (Sept. 28, 2010). But unlike the treatment he gave to defendant Ali Shaygan, Sean Cronin himself was never prosecuted for his offensive conduct and apparently continued to work without interruption as a federal prosecutor. Jay Weaver, "Exposure case against prosecutor dropped," *Miami Herald* B3 (Oct. 20, 2010). The state prosecutors' closeout memo stated that although Cronin "ran across the street into an open field … there is insufficient evidence to prove that at the time [he] fled, he was aware of the officer's intention to detain him." *Id.* Ironically, the state prosecutor's solicitude for *mens rea* is what was lacking in Cronin's own work. *See* Point II, *infra.*

At least two specific types of prosecutorial wrongdoing – both present in this case – will likely increase under the ruling below: "charge stacking" and improper handling of witnesses. "Charge stacking" (or "count stacking") is a prosecutorial tactic to bully defendants by tacking on an absurdly inflated quantity of charges for the alleged crime. Below, a 141-count superseding indictment was filed in retaliation for the defendant exercising his constitutional rights, as documented by the trial judge. This piling on of charges for tactical advantage is obviously inappropriate, particularly when the charges have mandatory minimum sentences. "Reasonable opponents do not doubt that federal law enforcement is well intentioned in most cases. However, they believe it is naive to assume that prosecutorial discretion will prevent the misuse of mandatory minimums, with experience showing that governmental good faith will not always suffice." Erik Luna & Paul G. Cassell, "Mandatory Minimalism," 32 Cardozo L. Rev. 1, 15 (Sept. 2010).

Yet appellate courts have barely acknowledged this improper tactic, instead relying on the good will of federal prosecutors to stand between an accused and an unconscionably long prison sentence. In one example, charge stacking resulted in a sentence of 55 years on a drug-related offense arising from the mere sale of marijuana on three occasions by someone who coincidentally possessed a firearm. *United States v. Angelos*, 433 F.3d 738, 742 (10th Cir. 2006), *cert. denied*, 549 U.S. 1077 (2006). The trial judge was so distressed by this that he expressly urged the president to commute the sentence, a plea that would puzzle any layman wondering why a judge needs to ask a president to dispense justice in a case over

which the judge is presiding. *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004). The appellate court, in rejecting an Eighth Amendment challenge to this 55-year sentence, noted that "former federal judges, United States Attorneys General, and high-ranking United States Department of Justice officials" filed an *amicus* brief urging reversal of this draconian punishment, the equivalent of a life sentence for the young man.[3] 433 F.3d at 750.

If "charge stacking" can escape application of the Hyde Amendment, then this practice to impose unjustly long sentences will grow. Instead, the Hyde Amendment should remain a safeguard against this abuse, to deter this practice against innocent defendants and, as a secondary benefit, minimize its use against over-punishing those who are guilty of something.

Mishandling of witnesses is the second type of prosecutorial wrongdoing which should remain deterred under the Hyde Amendment. There may be no other possible deterrent. Bernard Rottschaefer, M.D., was initially sentenced to 7.5 years in prison based on sensational sex-for-drugs testimony by a government witness, which was later shown to be a complete lie in exchange for leniency for the witness:

> After trial, Rottschaefer's attorney discovered 529 pages of handwritten correspondence between [key government witness] Riggle and her then-

[3] The long and impressive list of *amici* urging reversal of the draconian sentence in that case is set forth in its caption, and included the former U.S. Attorney General Griffin B. Bell, and former federal appellate judges Abner J. Mikva, William A. Norris, George C. Pratt, and Patricia M. Wald.

> boyfriend in which Riggle denied having sex with Rottschaefer and explained that she had agreed to lie in order to receive a more favorable sentence on drug charges pending against her in state court. In the letters, Riggle describes conversations in which DEA agents suggested that she would be rewarded for "good" testimony and explains her decision to go along with their suggestions [including] "DEA said they will cut my time for good testimony."

United States v. Rottschaefer, 178 Fed. Appx. 145, 148 & n.2 (3d Cir. 2006), *cert. denied*, 549 U.S. 887 (2006). But repeated attempts by Dr. Rottschaefer to obtain a new federal trial were rejected, because the standard for a new trial due to perjury is set so high that it is virtually impossible to satisfy. *Id.* at 149 (courts take over the jury's fact-finding role on such motions and grant a new trial only if it holds that a new trial "would probably produce an acquittal"). *See, e.g.*, Brian Murray and Joseph C. Rosa, "He Lies**,** You Die: Criminal Trials, Truth, Perjury, and Fairness," 27 N.E. J. on Crim. & Civ. Con. 1, 24 (Winter 2001) (criticizing how proof of material perjury does not compel a new trial).

The only external check against federal prosecutorial misconduct, which can occur in many forms, is the Hyde Amendment. It must be applied broadly to deter the inevitable wrongdoing that occurs under the guise of federal criminal justice.

II. FULL APPLICATION OF THE HYDE AMENDMENT IS PARTICULARLY NECESSARY BECAUSE THE REQUIREMENT OF *MENS REA* IS VANISHING IN FEDERAL PROSECUTIONS AND SENTENCING.

Notably absent from the overzealous prosecution of Dr. Ali Shaygan – and from the panel opinion below – is attention to the fundamental requirement of *mens rea*. Such omission is common now, as the requirement of proving criminal intent in federal court for convictions and sentencing is disappearing, while state courts still take it seriously. Federal court prosecutions are becoming more utilitarian in nature, as unconscionably long prison sentences are increasingly the goal regardless of whether *mens rea* exists or is commensurate with such punishment.

In light of this trend, the deterrence against prosecutorial wrongdoing provided by the Hyde Amendment is even more important. As emphasis on proof in federal court of *mens rea* at trial and sentencing declines, the risk of unjustified prosecutorial actions increases. And with that growing risk comes the enhanced possibility of prosecutorial misconduct in quest of the utilitarian goal. If the Hyde Amendment loses its meaning, then there will be no meaningful restraints on a utilitarian, "end justifies the means" approach to prosecution. Engaging in wrongdoing to convict an innocent man, in order to deter future crimes, can even be rationalized under a utilitarian approach to justice. *See* Stephanos Bibas, "Bring Moral Values into a Flawed Plea-Bargaining System," 88 Cornell L. Rev. 1425, 1428 (July 2003) (observing, and criticizing, the view that "guilty pleas by innocent defendants [is] a great utilitarian boon").

There are obviously thousands of drug addicts in our Nation, and thousands of physicians compelled by their professional duty to treat the everyday medical problems of these addicts. It is statistically inevitable that some drug addicts will overdose on a cocktail of an illegal drug and a pain medication received from a physician, as apparently happened in this case. Every time this happens, federal charges with a mandatory minimum of 20 years in prison can be pursued against the treating physician. Such was the plight of Dr. Shaygan, without persuasive evidence that he ever had any criminal intent justifying the attempted 20-year prison sentence. The DEA could have simply revoked his registration to prescribe medication if it genuinely thought he was misusing it. Physicians are not nannies to be sent to prison as scapegoats when patients misbehave.

The panel opinion below strains mightily to paint Dr. Shaygan, who testified openly in his own defense at trial, in as unflattering a light as possible. The government had sent in undercover agents to pose as patients and attempt to obtain drugs without an ordinary medical evaluation, but in fact Dr. Shaygan did "thorough medical exams" on them. (Appellee 11th Cir. Br. at 8) Yet the panel opinion pejoratively describes those examinations as "minimal", as though criminal intent should somehow be established based on how extensively a physician examines an uncooperative patient. (Pet. App. 5) The bottom line is plainly this: Dr. Shaygan had the misfortune of becoming the scapegoat for a cocaine-using patient who overdosed. Proof of criminal intent to justify a mandatory 20-year sentence for this physician was woefully lacking.

A 20-year prison sentence that was imposed on another physician, Perry Reese, M.D., illustrates how meaningless the *mens rea* requirement has become in federal prosecutions. An African American, Dr. Reese became the scapegoat for a drug-addicted white patient who enlisted his son-in-law sheriff to conduct a small-town sting operation against the physician. The State evidently found insufficient basis for criminal prosecution, and rightly so. But years later federal prosecutors charged Dr. Perry by oddly invoking the RICO statute, and then obtained a 20-year prison sentence by arguing that nearly every prescription Dr. Perry ever wrote constituted drug dealing. There was no proof of criminal intent to justify the 20-year sentence, and it was implausible to argue that nearly all of the physician's prescriptions were written in bad faith, but on appeal the Fourth Circuit affirmed in an unpublished opinion under the "clear error" standard of review. *United States v. Reese*, 442 Fed. Appx. 8, 12 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1067 (2012). The result was that allegations the State found unworthy of prosecution became a 20-year incarceration in federal prison for Dr. Perry.

Last Term this Court observed that "we traditionally presume a *mens rea* requirement if the statute imposes a 'severe penalty.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2654 (2012). But in practice many federal prosecutors do not view the *mens rea* requirement as seriously as state prosecutors do, and the panel opinion below did not even mention it. The trend in federal criminal justice is towards a utilitarian system in which criminal intent by the accused is nearly irrelevant. In such a system, it is particularly ill-advised to drop the Hyde

Amendment deterrence against prosecutorial wrongdoing, or else such wrongdoing will predictably increase amid the utilitarianism.

With neither a meaningful requirement of proof of *mens rea* nor any punishment for wrongdoing in obtaining draconian sentences, rogue federal prosecutors have a blank check to imprison those who happen to be in the wrong place at the wrong time. Such unchecked power is inconsistent with "government … by the people," Abraham Lincoln, "Gettysburg Address" (Nov. 19, 1863), and with the Founders' design for limiting federal power. *See* The Federalist No. 51 (entitled "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments").

CONCLUSION

The Petition for *Certiorari* should be granted.

Respectfully submitted,

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Dated: August 9, 2012