IN THE SUPREME COURT OF THE UNITED STATES

Docket No. 18-485

EDWARD D. McDONOUGH, Petitioner

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH, Respondent.

MOTION FOR DIVIDED ARGUMENT

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1. Pursuant to Rules 28.4 and 28.7 of this Court undersigned counsel, on behalf of the St. Thomas More Lawyers Guild of Rochester, New York as amicus curiae in support of the Petitioner ("the Guild"), respectfully requests that 5 minutes of Petitioner's argument time be allocated to the Guild on the ground that the Guild will advance an argument helpful to the Court's resolution of the case that will not otherwise be made.

2. It must be noted at the outset that the Petitioner opposes this motion.

3. Nevertheless, in the course of briefing, the statute of limitations question presented by this case has come to include vexing due process issues that have confounded federal courts for decades and are the subject of deep divisions between the Courts of Appeal. Cole v. Carson, 802 F.3d 752, 765-773 (5th Cir., 2015)(collecting cases)(vacated on other grounds, 137 S.Ct. 497). What seems to be missing from the arguments of the parties and other amici is a crucial distinction that may help this Court correctly resolve these divisions: namely, the due process distinction between the deliberate and willfully dishonest official misconduct involved in this case [covered by Mooney v. Holohan, 294 US 103 (1935) and its progeny] on the one hand; and unintentional, negligent or reckless errors [covered by Brady v. Maryland, 373 US 83 (1963) and its progeny] on the other.

4. For its part, the United States has thankfully abandoned its previous position, articulated in

such cases as Pottawattamie County v. McGhee (Supreme Court Docket No. 08-1065), that the requirements of due process do not apply at all to pretrial misconduct by police and prosecutors. (**See Brief amicus curiae of the United States, *passim*; and the Guild's brief as amicus curiae at pp. 10-12**) But the government has gone on to advocate the equally harmful and erroneous view that deliberate lying and cheating by police and prosecutors in the course of criminal prosecutions is, or should be, subject to the well known "materiality" test of the Brady line of cases ("reasonable probability of a different outcome")[1] before a constitutional due process violation is found to have occurred (**Brief of United States as amicus curiae, pp. 25-26**).

5. The Respondent has also addressed this Brady materiality issue and astonishingly argued that the official misconduct and dishonesty that allegedly took place during the course of Petitioner's criminal prosecution - which included fabrication and falsification of evidence and forgery of witness affidavits (**Petitioner's brief, p. 2**) - was "immaterial" by definition because the Petitioner was ultimately acquitted (**Respondent's brief pp. 25-26**).

6. The better and we submit correct argument is that such deliberate misconduct by police and prosecutors is a *per se* due process violation that both: a) is actionable under 42 U.S.C. §1983 despite an acquittal; and b) requires automatic reversal - not even subject to "harmless error" review - if there is a conviction.

7. The history of the relevant case law is important. The holding of the Mooney line of cases[2] dealing with the due process implications of *deliberate* official misconduct and dishonesty in criminal prosecutions was "extended" by Brady to invalidate criminal convictions where there had been official suppression of exculpatory evidence even if the suppression was inadvertent - that is, "...irrespective of the good faith or bad faith of the prosecution..." But a conviction was to be overturned on the latter

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[1] United States v. Bagley, 473 US 667, 678-682 (1985); United States v. Agurs, 427 US 97, 103 (1976) But see, n. 4, *infra*.

[2] Prior to the Brady decision in 1963 these would have included Mooney; Walker v. Johnston, 312 US 275 (1941); Waley v. Johnston, 316 US 101 (1942); Pyle v. Kansas, 317 US 213 (1942); Alcorta v. Texas, 355 US 28 (1957); and Napue v. Illinois, 360 US 264 (1959)

basis only if the suppressed evidence was "...material either to guilt or to punishment..." (Brady, 373 US at 87), a qualification that had never been applied to the Mooney line of cases.[3]

8. This Court should not let the arguments of the parties or the United States conflate the two lines of cases here, where the distinction between them may best inform the outcome.

9. The last time this Court explicitly addressed a Mooney scenario exclusive of the related line of Brady cases was Miller v. Pate, 386 US 1 (1967), four years *after* the Brady decision. Significantly, Miller was decided almost simultaneously with - but just prior to - Chapman v. California, 386 US 18 (1967), where this Court held for the first time that "harmless error" review could apply to federal constitutional violations occurring at criminal trials.

10. Here, then, is Miller's holding:

> "...The prosecution *deliberately* misrepresented the truth.
>
> More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been no deviation from that established principle. There can be no retreat from that principle here."

Miller, 386 US at 7 (emphasis supplied)(citations omitted)

11. Like all the cases from this Court strictly in the Mooney line, Miller was unanimous and emphatic. Oddly, the Miller court did not discuss or identify the reason a "retreat" from Mooney's holding was even being contemplated; but the conclusion that the Court had the Chapman holding in mind is unavoidable given the close temporal proximity of the two cases. Indeed, Chapman was the very next opinion issued by this Court.

12. The conclusion that the Miller court was therefore implicitly *rejecting* the proposition that harmless error review could ever apply to a Mooney situation is similarly unavoidable. Put differently, Chapman "harmless error" analysis would have been rejected *explicitly* in Miller but for the fact that Chapman, although already decided as a practical matter, had not yet been officially published.

13. This position - that is, that deliberate falsification of evidence by the government in

[3] Unfortunately, the only circuit that has been absolutely clear in this regard is the first. Haley v. City of Boston, 657 F.3d 39, 47-50 (1st Cir., 2011); see also, Drumgold v. Callahan, 707 F.3d 28, 38-39 (1st Cir., 2013)

criminal prosecutions is a *per se* actionable constitutional due process violation also requiring automatic reversal in the event of a conviction - is not likely to be articulated or addressed at oral argument unless undersigned counsel is included, however briefly. At one extreme, the Respondent will apparently argue a *per se* rule of his own - namely, that where there is an acquittal any evidence fabricated by the government to obtain a conviction is *per se* "immaterial". The United States may not go that far, but apparently will still advocate that the materiality test of Brady be applied to Mooney scenarios, effectively making Brady a limitation on Mooney instead of the "extension" Brady specifically declared itself to be. For his part, the Petitioner is likely to ask the Court to reject the Respondent's and the United States' positions but is also likely to concede that Chapman "harmless error" analysis applies to Mooney scenarios in the belief that this is a moderate position more likely to appeal to more Justices of the Court.

14. But if undersigned counsel is correct, all of these are arguments for *changing* the law to become more tolerant of dishonest government prosecutions than it currently is. The Mooney line of cases has never been formally limited or qualified by this Court in any way.[4] The Court should hear from someone who argues that this is as it should be - and that it should remain so.

Dated: April 3, 2019

Respectfully submitted,
//s// John M. Regan, Jr.
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[4] It is true that Bagley discussed a materiality standard that might be applicable to Mooney scenarios - in a portion of Justice Blackmun's opinion that was not the opinion of the Court. The same issue was discussed in United States v. Agurs, 427 US 97, 103 (1976)(a passage cited repeatedly by the United States in its brief at pp. 25-26); but the Agurs Court simultaneously noted that the issue was not actually presented by that case ("Since this case involves no misconduct...the test of materiality followed in the *Mooney* line of cases is not necessarily applicable to this case").