No. 21-

IN THE

Supreme Court of the United States

RICHARD E. PAULUS, M.D.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

C. DAVID MUSSETTER
MUSSETTER LAW OFFICE
P.O. Box 192
2709 Louisa Street
Catlettsburg, KY 41129
(606) 931-0050

ROBERT S. BENNETT
Counsel of Record
HILARY H. LOCICERO
PEGGY G. BENNETT
BENNETT LOCICERO & LIU LLP
2168 Wisconsin Avenue, NW
Washington, DC 20007
(202) 880-2309
rsbennett@bllfirm.com

Counsel for Petitioner

308739

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Petitioner faced a jury trial and was convicted, but the district court granted a post-trial judgment of acquittal. The government exercised its limited right to appeal in criminal cases and persuaded the Sixth Circuit to reinstate Petitioner's conviction, but it did so by withholding critical exculpatory evidence from the appellate court and Petitioner and making arguments directly contradicted by that evidence. When the government's due process and ethical violations came to light, the appellate court set aside Petitioner's previously reinstated convictions.

The prosecutors announced their intent to retry Petitioner. He argued that a second trial would constitute double jeopardy, because the decision reversing his acquittal had been the product of a fraud upon the court and, but for that fraudulently procured opinion, he would have been protected from retrial by virtue of his acquittal. The Sixth Circuit held, in conflict with precedent from this Court and the Third Circuit, that Petitioner's argument exceeded the bounds of its interlocutory jurisdiction to consider his Double Jeopardy appeal.

The questions presented are:

1. Did the Sixth Circuit err by ruling that it lacked jurisdiction to consider Petitioner's allegations of fraud upon the court and ethical and due process violations by the government when evaluating his double jeopardy claim?

2. When the government commits fraud upon an appellate court in securing reversal of a post-

trial judgment of acquittal and reinstatement of a jury verdict, and that verdict is later set aside, can the defendant rely on the initial acquittal to invoke the protections of the Double Jeopardy Clause and bar a second trial?

RELATED CASES

United States v. Paulus, No. 0:15-cr-00015-DLB-EBA, United States District Court for the Eastern District of Kentucky. Judgment entered Mar. 7, 2017.

United States v. Paulus, No. 17-5410, United States Court of Appeals for the Sixth Circuit. Judgment entered Jun. 25, 2018.

United States v. Paulus, No. 0:15-cr-00015-DLB-EBA, United States District Court for the Eastern District of Kentucky. Judgment entered Apr. 18, 2019.

United States v. Paulus, No. 19-5532, United States Court of Appeals for the Sixth Circuit. Judgment entered Mar. 5, 2020.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

OPINIONS BELOW

The Sixth Circuit's decision was not published in the Federal Reporter but is reported at 2021 WL 3620445 and reprinted in the Appendix ("App'x.") at 1a-14a. The district court's opinion was not published but is reported at 2020 WL 10759440 and reprinted at App'x. 15a-31a.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "**No person shall** be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person **be subject for the same offense to be twice put in jeopardy of life or limb**; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

PETITION FOR A WRIT OF CERTIORARI

This case presents issues that are fundamental to the constitutional rights of criminal defendants. The Fifth Amendment's due process guarantee is the bedrock of our criminal justice system. While criminal defendants are not promised a perfect trial, they are promised a fair one. Federal prosecutors play a crucial role in protecting that right. While the standards by which prosecutors must conduct themselves are well-settled, the law is unclear about what should happen when they violate those standards. Petitioner asks the Court to bridge this gap in the law and affirm his right to relief from the impacts of a judicial decision procured through a fraud upon the court.

Double jeopardy jurisprudence provides that when a defendant is acquitted after trial, whether by jury or judge, he cannot be forced to stand trial again. In this case, Petitioner secured a post-trial judgment of acquittal from the district court and was entitled to rely on that protection. But the government's lawyers engaged in deceptive and misleading conduct through which they convinced the appellate court to reverse his acquittal. When Petitioner learned about how the government's lawyers had deceived the Sixth Circuit, he argued that the judicial opinion reversing his conviction should be voided and he should be permitted to rely upon his acquittal – which had been reversed solely because of the government's fraud upon the court – to invoke double jeopardy protection. The Sixth Circuit refused to consider that issue, holding that its interlocutory jurisdiction over Petitioner's double jeopardy appeal was too narrow to permit consideration of related prosecutorial misconduct and fraud upon the court allegations. That conclusion

conflicted with precedents from this Court including *Richardson v. United States*, 468 U.S. 317, 322 (1984) and a Third Circuit decision, *United States v. Washington*, 549 F.3d 905, 911 (3d Cir. 2008). As a result, Petitioner was denied a remedy, the letter and spirit of the Double Jeopardy Clause were violated, and the government's misconduct went unaddressed.

The Court should grant a writ of certiorari to resolve these conflicts and clarify the appellate courts' power to remedy fraud upon the court in criminal cases. Without such guidance, the Sixth Circuit's decision, which effectively rewarded prosecutorial misconduct and corresponding violations of due process, will send the wrong message to prosecutors about whether ethics matter more than victory.

STATEMENT OF THE CASE

A. Legal Background

1. Prosecutorial Misconduct and Fraud Upon The Court

Federal prosecutors have legal and ethical obligations to the defendants they prosecute and the tribunals in which they try their cases and argue appeals. The Court famously pronounced more than eighty years ago that "[i]t is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935). Professional associations that regulate attorney conduct acknowledge that "[a] prosecutor has the responsibility of

a minister of justice and not simply that of an advocate." ABA Model Rule of Professional Conduct 3.8, cmt (2015).

"As an officer of the court, every attorney has a duty to be completely honest in conducting litigation" and "when he departs from that standard in the conduct of a case he perpetrates a fraud upon a court." *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1993) (quoting in part 7 Moore's Federal Practice and Procedure ¶ 60.33). The Sixth Circuit has held that this duty includes an "obligation to take no steps that prevent an adversary from presenting his case fully and fairly." *Demjanjuk*, 10 F.3d at 354.

The obligation to safeguard due process does not end when a trial is complete and an appeal begins. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (acknowledging the right to due process at the appellate level). Lawyers representing the government on appeal must act ethically, satisfy their duty of candor to the tribunal, and ensure the defendant is afforded due process throughout the appellate process.

2. The Prohibition Against Double Jeopardy

The Double Jeopardy Clause provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The clause prohibits a second prosecution for the same offense after an acquittal or conviction. *Green v. United States*, 355 U.S. 184, 187 (1957). It also prohibits multiple punishments for the same offense. *Id.*

Acquittals hold special significance in double jeopardy law. The Double Jeopardy Clause unequivocally prohibits a second trial following a substantive acquittal that is based on a determination that the government's evidence is insufficient, whether rendered at the trial or appellate level. *Burks v. United States*, 437 U.S. 1, 16-17 (1978). This rule applies equally to acquittals by juries and judges. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1977) (holding that the Double Jeopardy Clause prohibited a second trial following a hung jury and subsequent acquittal by a district court judge); *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial."). This rule applies regardless of any errors in the rendering court's analysis: "[T]he public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation." *United States v. DiFrancesco,* 449 U.S. 117, 129 (1980) (internal quotation omitted). This rule exists because

> [t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent, he may be found guilty.'"

United States v. Scott, 437 U.S. 82, 91 (1978) (quoting *Green*, 355 U.S. at 188).

The government has a limited right of appeal in criminal cases. By statute, "no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731. When a prosecution ends with acquittal in the district court and the Double Jeopardy Clause bars a second trial, the government may only appeal to the extent its request for relief will not require the defendant to be tried a second time. *United States v. Wilson*, 420 U.S. 332, 344-45 (1975). Thus, the government can ask an appellate court to reverse a post-jury verdict judgment of acquittal and reinstate the jury's verdict, but that is the only relief it can obtain. "[I]t is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous." *Green*, 355 U.S. at 188. If the verdict cannot be reinstated, the government is entitled to no relief. *See, e.g., Martin Linen Supply Co.*, 430 U.S. at 575 (because there was a hung jury, there was no verdict that could be reinstated, and the government was entitled to no relief from the trial judge's Federal Rule of Criminal Procedure 29(c) acquittal).

B. Factual Background

Richard Paulus is a retired interventional cardiologist who specialized in the placement of coronary artery stents. He had an extremely busy practice and received patient referrals from more than 700 physicians in the tristate area of Kentucky, West Virginia, and Ohio where he practiced, a region colloquially called the "Coronary Valley" because it had the highest incidence of coronary artery disease in the United States. Trial Tr., R.241/PageID#8255. In 2015, Paulus was indicted on charges

of health care fraud under 18 U.S.C. § 1347 and false statements under 18 U.S.C. § 1035. The indictment alleged that coronary artery stent placement is only necessary when a patient has a blockage (sometimes called an "occlusion") of 70% or more in an artery, as determined primarily by angiography, and that from 2008 to 2013, Paulus placed stents in patients with less than 70% blockage but described their blockages as more severe in medical records to ensure insurance reimbursement.

Pre-Trial Proceedings

Before trial, Paulus asked the prosecutors from the U.S. Attorney's Office for the Eastern District of Kentucky ("USAO") to produce to him, among other things, all exculpatory information in its possession and any statements made by his former employer, King's Daughters Medical Center ("KDMC") to the government. Exs. to Mot., R.368-6/PageID#13379, 13382; R.368-7/PageID#13386-13391; R.368-8/PageID#13393-13396; R.368-9/PageID#13398-13400; R.368-10/PageID#13402-13403. In response, the government insisted it had satisfied its obligation to produce all exculpatory material. At no time did the government disclose that information was being withheld for any reason. R.368-9/PageID#13399; R.368-10/PageID#13402-13403.

When trial was just one month away, however, the government made a contrary representation to the district court, in a sealed, *ex parte* motion regarding a discovery dispute it was having with KDMC.[1] Mot.

1. Because the motion was *ex parte*, Paulus's lawyers could see it listed on the docket but could not access it. When they

R.156/PageID#3413-3419. In the motion, the government disclosed that almost three years earlier, in 2013, KDMC had sent a letter to the USAO that conveyed exculpatory information about Paulus. Exh. to Mot., R.382-2/PageID#14530-14531. The letter revealed that KDMC had retained independent experts to review "a random sample of 1049 stent procedures out of the approximately 4600 procedures performed by Dr. Richard Paulus during the period covered by" the government's investigation (the "KDMC Review"), *i.e.*, a review of 23% of the procedures Paulus had performed during the years relevant to the indictment. *Id.*/PageID#14530. The letter stated that "in 75 of those 1049 procedures the percentage of occlusion was 30% or less" and that KDMC was refunding the monies it had been paid in connection with them. *Id.* The KDMC Review thus found that only 7% of Paulus's procedures met this repayment threshold.

The government wrote in the August 16, 2016 *ex parte* pleading that it intended to present testimony at Paulus's upcoming trial describing the KDMC Review and KDMC's repayment of fees, but the hospital was claiming the information was privileged and "refuse[d] to consent to disclosure." Mot., R.156/PageID#3414-3416. KDMC had not provided the letter to Paulus's counsel and "claim[ed] the United States [was] prohibited from disclosing the letter to defense counsel" as well. *Id.*/PageID#3416.

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inquired about the motion, Assistant U.S. Attorney ("AUSA") Kate Smith told Paulus's lawyers that the motion related to a privilege claim by KDMC but was "not related to anything of substance impacting" Paulus. Decl., R.371-1/PageID#13490. That was a misrepresentation. The *ex parte* motion was of enormous substantive importance to Paulus.

In its *ex parte* motion, the government proactively urged the district court to find that the information about the KDMC Review was exculpatory. In a section titled in boldface type, "**The Information Should be Disclosed**," the government argued that information about the KDMC Review required pretrial disclosure to Paulus under both Federal Rule of Criminal Procedure 16 and *Brady v. Maryland*, 373 U.S. 83 (1963). *Id.*/PageID#3417. The government argued that *Brady* applied because the 7% result had exculpatory value for Paulus when compared to the higher rates of problematic procedures found in the government's expert reviews:

> [T]he United States is concerned that there is an articulable theory under which the information qualifies for disclosure under *Brady* and its progeny. The KDMC experts found the Defendant's procedures to be problematic in less than 7.5% of the sample reviewed. The United States' experts have found the Defendant's procedures to be problematic nearly 50% of the time. Although this does not appear to fit into the Defendant's current defense – that all of his procedures were medically necessary – it is highly likely this information could be viewed as exculpatory at sentencing, assuming he is convicted, or earlier, if his defense strategy changes.

Id. The government wrote that it "consider[ed] the fact of KDMC's review and repayment admissible evidence at trial that should be disclosed to the Defendant in advance of trial" and requested "a ruling clarifying that the information disclosed is not privileged and should be provided to the Defendant." *Id.*/PageID#3418.

The district court thereafter held an *ex parte* evidentiary hearing with the prosecutors and two lawyers for KDMC, but with defense counsel excluded, in violation of Paulus's Sixth Amendment right to counsel. Hearing Tr., R.303/#11971-11989. At the *ex parte* hearing, District Judge David Bunning did not address KDMC's privilege claim, but instead questioned whether evidence of the KDMC Review would be admissible at trial. *Id.*/PageID#11972-11973. In response, AUSA Smith argued that the "underlying facts" about the KDMC Review were relevant and admissible. *Id.*/PageID#11975, 11978-11979, 11985-11986. She reiterated that *Brady* required disclosure of the result of the KDMC Review to Paulus regardless of its admissibility. *Id.*/PageID#11975. When the district court inquired whether the letter was inculpatory or exculpatory, AUSA Smith explained that the 7% result of the KDMC Review had exculpatory value as to potential sentencing issues and Paulus's guilt or innocence. *Id.*/PageID#11976-11977 ("Experts have identified in the realm of 50 percent of the procedures they reviewed [a]s problematic. And here you have another set of procedures where someone came in with a very different number. They came in at under seven and a half percent.")

Despite this concession that the 7% result was exculpatory information that required pretrial disclosure to Paulus, Judge Bunning ruled that the information about the KDMC Review was inadmissible at trial and not to be disclosed to Paulus during trial. *Id.*/PageID#11986-11987; Order R.163/PageID#3458-3459. The district court's oral ruling and written order did not address whether the evidence could be disclosed to the Sixth Circuit. *See id.*

The Trial

Paulus's trial began in September 2016 and lasted for seven weeks. The government's case-in-chief relied heavily on expert testimony from doctors who had reviewed small samples of Paulus's stent procedures and concluded that the blockages recorded for many of them were inaccurate. Dr. Michael Ragosta testified that he reviewed 250 to 300 procedures but did not advise the jury that his sample had been cherry-picked by the USAO, which had provided him with several pre-selected batches of procedures to review, including the 75 identified in KDMC's letter. Dr. David Moliterno reviewed only 15 procedures, all of which had been hand-selected by the USAO from an unknown total universe of procedures. Dr. Howard Morrison reviewed only 11 of Paulus's procedures from an unknown total universe of procedures.

At the close of the government's case-in-chief, Paulus moved for an acquittal, arguing that the government's evidence established nothing more than disagreements between physicians that at most supported a civil action. Judge Bunning reserved ruling on the motion under Rule 29(b). R.225/PageID#6857. Paulus put on a defense case-in-chief, during which he presented, among other things, testimony from an expert cardiologist who agreed with his angiogram interpretations and evidence regarding the broad inter-observer variability in angiogram interpretation.

In its closing argument, the government focused heavily on its expert reviewers' high rate of disagreement with Paulus's angiogram interpretations. The jury convicted Paulus of the health care fraud count and ten false statements counts.

Post- Trial Judgment of Acquittal

On March 7, 2017, Judge Bunning granted Paulus a post-trial judgment of acquittal and conditionally granted his motion for a new trial pursuant to Rule 29(d)(1). Order, R.318/PageID#12188. Judge Bunning held that "there was insufficient evidence at the close of the Government's case-in-chief to support the jury's verdict." *United States v. Paulus*, No. CR 15-15-DLB-EBA, 2017 WL 908409, at *2 (E.D. Ky. Mar. 7, 2017), rev'd in part, vacated in part, 894 F.3d 267 (6th Cir. 2018). He determined that the government's evidence was insufficient with respect to falsity and criminal intent, two essential elements of the charged crimes. *Id*. at *3. Judge Bunning reasoned that the government's evidence reflected mere disagreements between physicians about how to interpret particular angiograms, and that the disagreements were insufficient to prove Paulus had purposely lied rather than simply made mistakes. *Id*. at *16. Evaluating the evidence under Rule 33, he found that the verdict was against the manifest weight of the evidence for the same reason. *Id*. at *24.

The Government's Appeal: *Paulus I*

In the summer of 2017, the USAO sought and received permission from the United States Department of Justice Office of the Solicitor General ("OSG") to appeal the judgment of acquittal. Notice, R.322/PageID#12315-12316. It appears that the OSG was not informed of the undisclosed *Brady* information, the *ex parte* hearing, or the *ex parte* ruling that the *Brady* information was inadmissible.

The government filed its opening brief in October 2017 and oral argument was conducted in April 2018. AUSA Smith – who served as both trial counsel and appellate counsel for the United States – never informed the government's lead appellate lawyer David Lieberman what had occurred at the pre-trial *ex parte* hearing or that the government possessed undisclosed *Brady* evidence, apparently repeating to him her misleading assertion that the sealed entries on the district court's docket related to a privilege dispute. Tr. of February 4, 2020 Oral Argument, R.424-1/PageID#14683. Nor did Attorney Lieberman review the sealed docket entries or make further inquiry.

During the appeal, the government argued that it had not simply shown periodic disagreements between Paulus and its expert witness cardiologists, but instead had established that Paulus made erroneous blockage interpretations repeatedly and systemically. The government knew that its experts had reviewed only a tiny subset of the thousands of stent procedures Paulus performed at KDMC, paling in comparison to the breadth of the undisclosed KDMC Review that had a tremendously more favorable result. Nevertheless, the government argued that the supposedly large fraction of Paulus's procedures that involved minimal blockages meant that only purposeful falsification and fraud could explain the disagreements between Paulus and the government's witnesses.

The government pressed this argument, in writing and in oral argument, more than a dozen times. For example, the United States asserted that Paulus had "systematically overestimated" the severity of patients' blockages, and claimed that he engaged in a "clear

pattern[] of stenosis exaggerations." *United States v. Paulus*, No. 17-5410 (6th Cir.), Opening Brief for the United States, Docket Entry No. 15 at 42, 51; *see also Paulus*, No. 17-5410 (6th Cir.), Reply Brief for the United States, Docket Entry No. 35 at 23. Regarding Dr. Ragosta, the government pointed out that he had reviewed 250-300 of Paulus's procedures and testified about 62 procedures in which he had disagreed with Paulus's angiogram interpretation. The government then argued that Dr. Ragosta "further observed this pattern across the 250-300 procedures he evaluated." Opening Brief at 48. These arguments echoed the government's repeated assertions at trial about "one third to half" of Paulus's procedures being unnecessary and angiograms being misinterpreted "frequently, repetitive[ly], daily."

On June 25, 2018, the Sixth Circuit ruled for the government. The government's argument about the high rate of disagreement between the experts and Paulus was the linchpin to its conclusion that the government's proof satisfied Rule 29. *United States v. Paulus* ("*Paulus I*"), 894 F.3d 267, 278 (6th Cir. 2018). In its Opinion, the Sixth Circuit explained that "[t]o convict Paulus, the government had to show that his false statements were willful and that he acted with intent to defraud." *Id.* at 277. It recognized that evidence showing "that different doctors can interpret the same angiogram differently – sometimes much, much differently" (*i.e.*, "interobserver variability") makes it difficult to prove that a cardiologist "saw one thing but willfully recorded another." *Id.* at 276. The panel also acknowledged that the issue of criminal intent was a close call. *See id.* (stating that it would not have been unreasonable for the jury to find that Paulus acted in good faith). But it concluded that at Paulus's

trial, the allegedly systematic and routine nature of the charged misstatements allowed the jury to find that they were willful falsehoods rather than mistakes. *See id.* at 277 (finding opinions of Ragosta, Morrison, and Moliterno "sufficient to carry the government's burden of proof" as they asserted "that Paulus routinely exaggerated what he saw on his patients' angiograms, and therefore that his statements were false"); *id.* at 278 (stating that the jury could reasonably conclude that the government's evidence showed "a lengthy pattern of fraudulent over-diagnosing by Paulus"). The Sixth Circuit reversed the judgment of acquittal, reinstated the convictions, and remanded the case to the district court. *Id.* at 279-80. Neither the Sixth Circuit nor Paulus knew while this was happening that the government's claim of "routine exaggerations" was refuted by powerful exculpatory evidence known only to Judge Bunning, the prosecutors, and KDMC.

Remand to the District Court

On remand, the district court denied Paulus's outstanding Rule 33 motion based on the Sixth Circuit's holding in *Paulus I* and scheduled sentencing.

In January 2019, Judge Bunning ordered that the sealed docket entries reflecting the August 2016 *ex parte* motion and *ex parte* hearing be provided to Paulus. For the first time, Petitioner learned about the KDMC Review's exculpatory result and the government's admission that it was *Brady* information he should have received pre-trial. Given that his convictions had been reinstated, he moved for a new trial under Rule 33(b)(1) and argued, among other things, that the government had violated *Brady* by failing to disclose the material exculpatory evidence

to him before trial. Mot., R.382-1/PageID#13869-13912. The district court denied the motion, sentenced Paulus to 60 months in prison, and denied bond pending appeal.

Paulus's Appeal: *Paulus II*

Paulus filed his appellate brief in the second appeal in August 2019. Paulus argued, among other things, that that the government had violated *Brady* and his right to due process by withholding the exculpatory information about the KDMC Review. The government disagreed and contended that the the KDMC Review had only minor exculpatory value and Paulus had not been harmed by its withholding. That directly contradicted AUSA Smith's argument in the court below, when she insisted that the information about the KDMC Review was exculpatory and disclosure was required. Tr. R.303/PageID#11975; Mot., R.156/PageID# 3417.

On February 2, 2020, the Sixth Circuit held oral argument on Paulus's appeal. During the argument, each of the panel members expressed concern that the government lawyers who pressed the appeal in *Paulus I* had violated their ethical obligations to the Sixth Circuit by withholding the information about the KDMC Review. Tr. R.424-1/PageID#14667-14668 (statements of Judge Batchelder and Judge McKeague); *Id.*/PageID#14682-14683 (statement of Judge Griffin). They indicated that the government lawyers could not excuse their misconduct by pointing to the district court's order restricting disclosure during trial, as that order had no impact on proceedings before the Sixth Circuit. *Id.*/PageID#14667-14668. Key excerpts from the oral argument include the following:

DAVID LIEBERMAN: Good afternoon. . . . . Can I just start off with a question that Judge Griffin asked about the ethical obligations of the government? The trial attorney and the US attorney's office throughout these proceedings in this case were consulting with the Office of Professional Responsibility and seeking guidance on what our position should be at the district court. . . .

JUDGE BATCHELDER: What about in front of this court? Because coming here you knew you had this problem. And did the Office of Professional Responsibility tell you, you didn't need to tell us about it either?

DAVID LIEBERMAN: I don't know if that was broached with the Office of Professional Responsibility.

JUDGE MCKEAGUE: Because at that point all Judge Bunning has said is don't disclose it until after the trial's over. The trial was over.

DAVID LIEBERMAN: The trial was -- the judge --

JUDGE MCKEAGUE: So, what would be possibly the reason to come here and argue that you had this overwhelming evidence of a pattern . . . [w]hen you, following Judge Bunning's order, have failed to disclose something that suggests maybe it's not a pattern.

> DAVID LIEBERMAN: We read the order as directing us to come back to Judge Bunning prior to sentencing, and we never got there because Judge Bunning issued [a] Rule 29 judgement of acquittal on findings and legal rulings that were not -- it was a legal sufficiency. It was not implicated -- it did not directly implicate the letter.
>
> DAVID LIEBERMAN: And that's the issue that was taken up to this court.
>
> JUDGE MCKEAGUE: But the letter certainly implicated your argument that there was legal sufficiency in order to convict and that he should not have set aside the verdict.

Id.

> JUDGE MCKEAGUE: You must have some DOJ guidelines about when you bring these cases and when you don't. I assume, don't you?
>
> DAVID LIEBERMAN: When we bring prosecutions?
>
> JUDGE MCKEAGUE: Yes, right.
>
> DAVID LIEBERMAN: I would assume. Unfortunately, I'm an appellate lawyer. So, I'm not involved in ordinary indictment decisions.
>
> JUDGE MCKEAGUE: Well, we can agree that if you found one case out of the 4,600 procedures

> this doctor did, you wouldn't accuse him of fraud in federal court.
>
> DAVID LIEBERMAN: Correct.
>
> JUDGE MCKEAGUE: So, you accused him of fraud when one of your studies showed it was about 50%. Well, I mean, that sounds reasonable to me. So, there's got to be some sort of a line between one and 50%. And you seem to say . . . it -- doesn't matter if it's 7% or if it's 50%. Intuitively it doesn't seem to make sense.

Id./PageID#14674-14675.

> JUDGE GRIFFIN: Yes, Mr. Lieberman, you argued this case before us the first time.
>
> DAVID LIEBERMAN: Yes, Your Honor.
>
> JUDGE GRIFFIN: So, you were the attorney that did not disclose to us this exculpatory evidence that you knew of. What is your best argument that you did not violate your ethical obligation to this court by not disclosing this evidence to us?
>
> DAVID LIEBERMAN: Judge Griffin, I can -- this is outside the record. I can respond that I knew that there was a privilege issue in the case. I did not inspect any of the documents or the *ex parte* hearing transcripts that were associated with the hearing so I did not know the substance of what had occurred during the

> *ex parte* conference. That is for me personally that of course we as the government knew about it, but your question asked about my personal knowledge.
>
> JUDGE MCKEAGUE: So, you didn't know it wasn't a privilege at all. It was an admissibility hearing. And you didn't know there had been an admissibility ruling that Paulus wasn't participating in? And you didn't know there was an order not to disclose?
>
> DAVID LIEBERMAN: I simply knew that there was an outstanding privilege dispute. And perhaps this is my fault, I did not inquire further as to the nature of that when I was preparing the government appeal in this case.

Id./PageID#14682-14683. Petitioner understands that the Department of Justice's Office of Professional Responsibility began investigating the government's conduct in the case shortly after the oral argument. Letter, *United States v. Paulus*, No. 19-5532 (6th Cir. Feb. 6, 2020).

On March 5, 2020, the Sixth Circuit vacated Paulus's convictions and remanded the case for a new trial. In its Opinion, the Sixth Circuit pointed out that while it had reinstated those convictions in *Paulus I*, it had done so without knowledge of the KDMC Review or its result. *United States v. Paulus ("Paulus II")*, 952 F.3d 717, 727 (2020). The Sixth Circuit recognized that the government had presented a narrative regarding Paulus misinterpreting angiograms "frequently, repetitive[ly],

daily." *Id*. at 721. The appellate court explained how the withheld evidence contradicted that assertion and undercut the government's argument regarding the sufficiency of its trial evidence:

> The argument that the omitted details from the Shields Letter were material is fairly simple. Because the KDMC Review found misdiagnoses in a much smaller percentage of cases than the government experts found (around 7% compared to nearly 50%), the study tends to refute the government's evidence that Paulus systematically misdiagnosed the amount of blockage in his patients' arteries. Instead, he may have made occasional mistakes or had occasional differences of opinion. And if Paulus didn't systematically overstate his patients' arterial blockages, then that weakens the government's evidence that Paulus intentionally defrauded his patients, their health insurance companies, and the government.
>
> Paulus also could have used the Shields Letter to impeach the government's witnesses by calling into question how representative their samples were. The government experts testified that Paulus repeatedly and systematically overstated the degree of blockage in his patients' arteries. *Paulus I*, 894 F.3d at 274. But Morrison and Moliterno each evaluated fewer than 20 procedures. *Id.* Given the Shields letter, Paulus could have pointed out that KDMC's much more extensive review found that Paulus misdiagnosed his patients less than 8% of the

> time. And while Ragosta reviewed 250–300 of Paulus's procedures, that is still far fewer than the 1,049 reviewed by KDMC. *Id.* Furthermore, Ragosta's sample was not random; 75 of the 250–300 files reviewed by Ragosta were selected for review because KDMC flagged them as problematic. Armed with the fact that KDMC pulled those 75 from a sample of 1,049, Paulus may have argued that Ragosta's sample was cherry-picked.

Id. at 726-27.; *see also* Tr. R.424-1/PageID#14678 (statement of Judge McKeague to Lieberman: "So, you cherry-picked."). Paulus was released from prison the next day, having served eight-and-a-half months.

Double Jeopardy Appeal

When the government announced its intent to retry Paulus, he moved to dismiss the charges on the ground that doing so would constitute double jeopardy. Motion R.424/PageID#14632-14650. He argued that although the government had succeeded in having his acquittal reversed during *Paulus I*, it did so by committing a fraud upon the Sixth Circuit, and an appellate-level due process violation, when it presented a false narrative about a high rate of disagreement with his angiogram interpretations. Petitioner argued that the *Paulus I* Opinion should be deemed void and that, with his acquittal thereby effectively undisturbed, a second trial would be impermissible. *Id.*

The government opposed the motion, attempting to characterize the case as a typical circumstance in which a defendant is convicted and seeks a new trial based on a

Brady violation – ignoring the fact that Paulus originally was *acquitted* by the district court – and arguing that the Double Jeopardy Clause "is not an absolute bar to successive prosecutions." Response R.426/PageID#14696. Although it had implored the district court to find that the KDMC Review information was exculpatory *Brady* evidence, the government claimed it bore no responsibility for failing to disclose the KDMC Review to the Sixth Circuit because it "was under no obligation to bring outside evidence that it viewed as inculpatory to the Sixth Circuit's attention while that appeal [*Paulus I*] was pending." *Id.*/PageID#14699-14700.

On September 1, 2020, the district court denied the double jeopardy motion. App'x. B. Judge Bunning recognized that "an acquittal, even if overturned, is to be accorded great weight and that the guarantee of the Double Jeopardy Clause which prevents a second trial after acquittal is to be applied strictly." *Id.* at 26a. He also agreed that when a defendant is granted a post-trial judgment of acquittal, a government appeal is permitted only to the extent that it seeks reinstatement of a jury verdict. *Id.* (stating that "[e]ven if an acquittal is ultimately overturned on appeal and a conviction reinstated, it is clear that a second trial is *still barred* by the Double Jeopardy Clause" (emphasis in original)). However, he determined that Paulus had waived the protection against double jeopardy by seeking a new trial following the jury verdict and again after discovering the withheld *Brady* evidence. The district court declined to consider whether the government had committed a fraud upon the Sixth Circuit or how such fraud would impact the validity of *Paulus I*, rejecting Petitioner's request for an evidentiary hearing on that issue.

On August 16, 2021, the Sixth Circuit affirmed the district court's double jeopardy ruling. App'x. A. The Sixth Circuit held that in exercising its narrow interlocutory jurisdiction to review Paulus's double jeopardy argument, it lacked the power to consider his allegations of prosecutorial misconduct and fraud upon the court. The Sixth Circuit also held that its decision in *Paulus II* had no impact, either express or implied, on the *Paulus I* Opinion that had reversed Paulus's acquittal and reinstated his convictions, and he therefore could not rely on the acquittal as a basis to invoke the Double Jeopardy Clause. The Sixth Circuit remanded the case to the district court for a second trial.

REASONS FOR GRANTING THE PETITION

In the decision under review, the Sixth Circuit misinterpreted this Court's precedents surrounding the collateral order doctrine and the Double Jeopardy Clause, erroneously concluding that it lacked jurisdiction to consider Petitioner's arguments about why a second trial would be improper. This Court should clarify whether a federal appellate court's interlocutory jurisdiction over a double jeopardy claim is broad enough to encompass consideration of interrelated factual allegations of fraud upon the court. The Court also should address the federal courts' authority to remedy appellate-level due process violations and fraud upon the court in criminal cases. The circuits are split on these issues, and the resulting gaps in the law leave Petitioner, and similarly situated future defendants, with no recourse for such prosecutorial misconduct. Without further review, the government will benefit from its misconduct in this case, and Paulus will be deprived of the double jeopardy protection that

inured to him when Judge Bunning granted the post-trial judgment of acquittal, which was wrested away through the government's fraud.

I. The Sixth Circuit's decision conflicts with decisions of this Court.

The crux of Petitioner's double jeopardy motion was that the government acted dishonestly in its overzealous effort to have his acquittal reversed, thereby tainting the Sixth Circuit's sufficiency of the evidence analysis, and improperly leading to reinstatement of his conviction. Paulus argued that this fraud upon the court rendered the government's appeal and the *Paulus I* Opinion void. The Sixth Circuit refused to consider that argument because it believed its interlocutory jurisdiction over the double jeopardy motion was too narrow to permit it to adjudicate those "independent" claims. That holding conflicts with this Court's decisions establishing that double jeopardy analyses can and regularly do include evaluation of a case's factual and procedural history.

Paulus appealed the district court's double jeopardy decision pursuant to the collateral order doctrine, a well-recognized exception to the final judgment rule set forth in 28 U.S.C. § 1291. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S.541, 546 (1949). In *Abney v. United States*, 431 U.S. 651, 662-63 (1977), the Court ruled that an appeal of a double jeopardy decision falls within the collateral order doctrine because, after a district court denies a double jeopardy motion, "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee." 431 U.S. at 659.

Additionally, "the very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial . . . The elements of that claim are completely independent of his guilt or innocence." *Id.* at 659-60. And finally, the prohibition against trying a defendant twice for the same offense "would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Id.* at 662.

This Court addressed the jurisdictional boundaries of a Double Jeopardy appeal seven years later in *Richardson*, 468 U.S. at 321. In that case, the defendant faced trial and was acquitted on the first count of his indictment, but the jury hung on two others. The district court declared a mistrial on Counts II and III, and the defendant argued that retrial on those counts would constitute double jeopardy because the government had failed to introduce sufficient evidence of his guilt on Counts II and III during the first trial. On appeal, the D.C. Circuit agreed with the government that the double jeopardy argument was not reviewable under the collateral order doctrine because it would require a "canvassing of the record" that "would be indistinguishable from an assessment of the sufficiency of the evidence that would be reviewed after a judgment of conviction, and, of course, would go to the heart of the Government's case on the merits." *Id.* at 321. But this Court rejected that reasoning and explained that when an argument about the sufficiency of the evidence is fundamental to a double jeopardy claim, collateral review

is permitted: "Petitioner seeks review of the sufficiency of the evidence at his first trial, not to reverse a judgment entered on that evidence, but as a necessary component of his separate claim of double jeopardy. While consideration of petitioner's double jeopardy claim would require the appellate court to canvass the sufficiency of the evidence at the first trial, this fact alone does not prevent the District Court's order denying petitioner's double jeopardy claim from being appealable." *Id.* at 322.

The same is true here. Paulus's fraud upon the court allegations are essential components of his double jeopardy claim. Including these allegations in his motion did not expand the relevant inquiry beyond the bounds of a "collateral" matter. The questions presented about the government's misconduct do not "go[] to the very heart of the issues to be resolved at the upcoming trial." *Abney*, 431 U.S. at 663. Paulus did not ask the Sixth Circuit to re-evaluate the sufficiency of the evidence at his trial and make a new decision about whether the evidence established health care fraud or false statements, but instead, to evaluate whether the government's misconduct unfairly interfered with the sufficiency analysis such that the government's appeal should be nullified. Paulus's argument would have required the Sixth Circuit to evaluate how the government's actions influenced the sufficiency of the evidence analysis during *Paulus I*, but it did not require a decision on the merits.

Additionally, because Petitioner's fraud upon the court allegations are integrally bound up in his double jeopardy claim, there is no way they can be addressed effectively following a second trial. Either Paulus will obtain relief for the fraud upon the court now and the government's

improper conduct will be unwound, or he will be required to wait until after a final judgment has been entered, at which point the propriety of a second trial will be moot.

The Court in *Richardson* granted certiorari to clarify the breadth of double jeopardy review because of "the implications of the decision below for the administration of criminal justice." 468 U.S. at 320. The same is warranted here. Absent guidance from the Court, the Sixth Circuit's decision will unfairly restrict the arguments criminal defendants may present in support of double jeopardy claims, making effective review of the government's conduct impossible in many cases.

II. The Sixth Circuit's decision conflicts with decisions of other federal courts of appeal.

In refusing to consider Paulus's allegations of fraud upon the court and due process and ethical violations by the government in the context of his double jeopardy claim, the Sixth Circuit asserted that they were "independent claims." App'x A at 5a. The law is in conflict, however, regarding whether Paulus could have lodged an independent claim of fraud upon the court to request withdrawal of the mandate in *Paulus I*.

It is clear, of course, that civil litigants have ready access to the courts to address fraud upon the court. The Court has held several times that federal courts have an inherent power to redress fraud upon the court in civil cases. In *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 239 (1944), this Court affirmed "the power of a Circuit Court of Appeals, upon proof that fraud was perpetrated on it by a successful litigant, to vacate its

own judgment entered pursuant to the Circuit Court of Appeals' mandate." *See also Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) ("The inherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court."); *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946) ("[T]he inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question."). This principle has been codified in Federal Rule of Civil Procedure 60(d)(3), which allows for jurisdiction and an exception to the principle of finality of judgments to address fraud upon the court.

The courts' equitable powers in the criminal context are much less clear. There is no criminal analog to Federal Rule of Civil Procedure 60(d)(3), which suggests that an independent cause of action to withdraw a judgment because of fraud upon the court is not permissible in criminal cases. This Court has addressed the issue of equitable power in criminal cases only generally, in a manner that circumscribed that power. In *Carlisle v. United States*, 517 U.S. 416, 426 (1996), the Court acknowledged its earlier holding in *Chambers* that it "would not 'lightly assume that Congress has intended to depart from established principles' such as the scope of a court's inherent power," but ruled that a district court did not have equitable power to grant an acquittal outside the time limit set forth in Rule 29, because equitable power cannot be used to circumvent existing procedural rules.

The Sixth Circuit has suggested in dicta in one unpublished decision that the power to remedy a fraud upon the court does exist in a criminal case. *United States v. Murray*, 2 F.App'x 398, 399-400 (6th Cir. 2001) (stating

that "[i]t is within the inherent powers of this court to recall a mandate" and describing fraud upon the court as a basis to do so).[2] At least one other Circuit appears to agree. *See United States v. Bishop*, 774 F.2d 771 (7th Cir. 1985) (stating that the district court had power to amend a criminal sentence given the defendant's fraud upon the court and that the resulting change to the defendant's sentence did not constitute double jeopardy). The Third Circuit, however, has reached the opposite conclusion. In *Washington*, the Third Circuit canvassed the law on this point and concluded that a district court lacked power to resentence a defendant who had procured his first sentence through a fraud upon the court. 549 F.3d at 914 ("[W]e find that there is no long unquestioned power of federal district courts to vacate a judgment procured by fraud in the criminal context.") (internal quotations and emphasis omitted). *See also United States v. Smiley*, 553 F.3d 1137, 1144 (8th Cir. 2009) (recognizing circuit split but declining to decide issue). This conflict in the jurisprudence is important because, at present, defendants like Paulus have no clear path to seek redress for an appellate level fraud upon the court. A ruling by this Court is necessary to correct the Sixth Circuit's erroneous jurisdictional ruling and to resolve the resulting conflict with the Third Circuit's decision in *Washington*.

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2. In the Sixth Circuit, criminal defendants have been permitted to invoke Rule 60(d)(3) to assert a fraud upon the court claim once their case has progressed to the civil habeas corpus stage. *See*, *e.g.*, *Workman v. Bell*, 227 F.3d 331, 336 (6th Cir. 2000). It would be illogical to conclude that someone in Paulus's posture must wait to assert this claim – tied as it is to a double jeopardy issue – after a second trial has concluded, when the relief sought will be moot.

III. The Sixth Circuit's decision is incorrect.

Although the Sixth Circuit declined to consider Petitioner's allegations of fraud upon the court, it nevertheless concluded that nothing that occurred during the government's appeal undermined its decision to reverse Paulus's acquittal. That conclusion was incorrect. The government's ethical and due process violations in this case – urging reversal despite clear knowledge that their pattern arguments were fallacious – amounted to a fraud upon the court because they improperly influenced the Sixth Circuit's resolution of the *Paulus I* appeal. *See Hazel-Atlas*, 322 U.S. at 247-48. This triggered a series of events that ultimately amounted to an end-run around the requirements of the Double Jeopardy Clause.

1. After Paulus's trial ended in 2016, the jury convicted him on some counts, but the district court granted a full acquittal. But for the government's subsequent misconduct, that acquittal would have protected him from a second prosecution. The Sixth Circuit acknowledged the rule that "[i]f a jury (or a judge) acquits a defendant, the Double Jeopardy Clause prevents the government from retrying the defendant," App'x. A at 7a, but brushed it aside because of a nuance in the case's procedural history. Because Paulus did not discover the government's deception during the first appeal, his conviction was reinstated; this necessitated a new trial motion when he finally discovered the truth. Taking advantage of that detail, the Sixth Circuit held that "when a jury convicts a defendant and the defendant 'succeeds in getting his first conviction set aside,' then the Clause does not apply." *Id.* at 8a (citing *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988)). The Sixth Circuit concluded,

> That's what happened in *Paulus I.* The jury convicted Paulus and then the district court *set aside* that conviction by granting Paulus's Rule 29 motion. We reversed the district court and reinstated the conviction.

Id. That paragraph mischaracterizes Paulus's success in the district court. Paulus did not have his conviction merely "set aside" by Judge Bunning. He was acquitted because the district court concluded the government's evidence was insufficient as a matter of law. That ruling blanketed him with double jeopardy protection. And the point of Petitioner's fraud upon the court argument was that, absent the government's deception, he never would have been stripped of that protection, and never would have needed to seek a new trial.[3] Under *Hazel-Atlas*, the appropriate remedy for the fraud upon the court is to restore the case to the procedural posture it occupied before the fraudulent acts were committed. What happened later is irrelevant.

2. In rejecting Petitioner's argument, the Sixth Circuit posited that, even if the government hypothetically had obeyed its duty of candor and revealed the exculpatory evidence during the first appeal, the result in *Paulus I* would not have changed. Implicit in this conclusion is the notion that the arguments presented to the Sixth Circuit

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3. Paulus did not waive his right to invoke double jeopardy protection by moving for a new trial. *See Burks v. United States*, 437 U.S. 1 (1978) (holding that the Double Jeopardy Clause barred a second trial and that "it makes no difference that a defendant has sought a new trial as one of his remedies . . . . It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial").

during its review of the judgment of acquittal would not have changed had Paulus and the Court known about the exculpatory evidence. That supposition is artificial and unrealistic and must be rejected. *See Greer v. United States*, 141 S.Ct. 2090, 2098 (2021) (rejecting similar argument in a criminal appeal that challenged the failure to provide a necessary jury instruction and explaining, "Greer asks us to assume a scenario where the proper instruction was given, but where the Government did not introduce additional evidence to [satisfy the instruction]. That is not a realistic scenario.") Had Paulus and the Sixth Circuit known about the exculpatory 7% result during the first appeal, the government would not have been able to make the same "pattern" arguments. The Sixth Circuit's analysis would have changed accordingly. This is crucial because, to prevail on his fraud upon the court allegations, Paulus was not required to show that the *result* of the Sixth Circuit's sufficiency of the evidence analysis in *Paulus I* definitively would have changed had the government been truthful. *See Hazel-Atlas*, 322 U.S. at 246-47 ("The Circuit Court also rested denial of relief upon the conclusion that the [fraudulently submitted evidence] was not 'basic' to the Court's 1932 decision. Whether or not it was the primary basis for that ruling, the article did impress the Court, as shown by the Court's opinion. Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for such an attempted appraisal."). To establish a fraud upon the court simply requires that the individual accused of perpetrating the fraud interacted with the court in a way that "prevent[ed] an adversary from presenting his case fully and fairly." *Demjanjuk,* 10 F.3d at 354. As the Sixth Circuit recognized at oral argument in *Paulus*

II, the government sought and secured reinstatement of Petitioner's conviction in a way that clearly impacted the Sixth Circuit's sufficiency analysis. *See* Tr., R.424-1/PageID#14667-14668 (statement of Judge McKeague that the withheld exculpatory evidence "certainly implicated [the government's] argument that there was legal sufficiency in order to convict and that [the district court] should not have set aside the verdict"). The appropriate remedy is to treat the government's appeal as void and restore the acquittal.

3. Finally, the Sixth Circuit suggested that, had the government revealed the KDMC Review information during the first appeal, it still would have granted the government's request for reversal of the acquittal, but then simultaneously granted Petitioner a new trial based on the *Brady* violation that had occurred at trial by virtue of the withholding of the exculpatory information. That outcome would have been improper because it would have permitted the government to evade the strictures of the Double Jeopardy Clause.

During the first appeal, the government – as the appellant seeking to reverse Paulus's acquittal – was only permitted to seek reinstatement of the conviction. *Wilson*, 420 U.S. at 344-45. Reinstatement would not have been proper, however, given the trial-level *Brady* violation. This Court has ruled that where the government appeals a defendant's acquittal and there is no jury verdict that can properly be reinstated, dismissal is required, as any other outcome would violate the Double Jeopardy Clause. *Martin Linen Supply Co.*, 430 U.S. at 575. That is what occurred here. If the Sixth Circuit could avoid the rule established in *Martin Linen* by way of the two-step ruling

it has envisioned, this would create an end-run around the rule that "the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous." *Green*, 355 U.S. at 188.

In any event, the prosecutors in this case did not act with candor. In reality, the government eschewed the truth in an overzealous effort to salvage its jury verdict. By withholding the exculpatory evidence during the first appeal, the government prevented Petitioner from fully and fairly arguing that the government's evidence was insufficient to establish criminal intent. That unethical conduct was a denial of due process and a fraud upon the court.

The government's lack of candor during its appeal was a grave miscarriage of justice that vitiated the Sixth Circuit's ruling in *Paulus I*. Because *Paulus I* must be effectively set aside, the only reasonable conclusion is that Petitioner's post-trial acquittal should be treated as undisturbed, and Petitioner should be able to rely upon it to bar a second trial.

IV. The case presents an issue of exceptional importance to criminal defendants throughout the United States and to the integrity of the federal courts.

This case presents important questions about how criminal defendants can secure relief when prosecutors employ unfair tactics to obtain a conviction. One of the existing mechanisms to protect against government overreach in criminal cases may be, of course, the Double Jeopardy Clause. Another is the courts' equitable power to remedy a fraud upon the court. As it stands, the Sixth

Circuit's opinion sets a dangerous precedent because it forecloses those avenues of relief on faulty grounds. This petition is worthy of attention for that reason and because the gaps in the law leave the courts vulnerable to manipulation. *See Universal Oil Products Co.*, 328 U.S. at 580 (explaining that certiorari was granted in a civil case involving fraud upon the court because "[q]uestions of importance in judicial administration were obviously involved by the disposition below"). As the Court explained in *Hazel-Atlas*, "tampering with the administration of justice . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." 322 U.S. at 246.

This Court has made clear that violations of *Brady* can be ethical violations. *See Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) ("[T]he obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations." (citing ABA Model Rule of Professional Conduct 3.8(d) (2008))); *see also* 28 U.S.C. § 530B (binding federal prosecutors to state ethics rules). Federal district courts have repeatedly rebuked prosecutorial gamesmanship. Yet the problem persists. This case, in which the fraud upon the court is clearly recorded in the record, is an ideal vehicle to address this entrenched problem and its corrosive impact on justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 15, 2021

Respectfully submitted,

C. David Mussetter
Mussetter Law Office
P.O. Box 192
2709 Louisa Street
Catlettsburg, KY 41129
(606) 931-0050

Robert S. Bennett
Counsel of Record
Hilary H. LoCicero
Peggy G. Bennett
Bennett Locicero & Liu LLP
2168 Wisconsin Avenue, NW
Washington, DC 20007
(202) 880-2309
rsbennett@bllfirm.com

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 16, 2021

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

File Name: 21a0386n.06omg

Case No. 20-6017

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD E. PAULUS, M.D.,

Defendant-Appellant.

August 16, 2021, Filed

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

OPINION

BEFORE: BATCHELDER, McKEAGUE, and GRIFFIN, Circuit Judges.

McKEAGUE, Circuit Judge. A jury convicted Dr. Richard E. Paulus of healthcare fraud and making false

statements relating to healthcare. The district court granted Paulus's Rule 29 motion for acquittal based on the insufficiency of the evidence, and we reversed. The district court then denied Paulus's motion for a new trial under *Brady v. Maryland*, and we again reversed. In the instant appeal, Paulus argues that the district court erred by denying his motion to dismiss the indictment because a new trial would violate the Double Jeopardy Clause. We disagree. Therefore, we **AFFIRM** the district court's denial of Paulus's motion to dismiss.

I.

This is case is before us for the third time. *See United States v. Paulus* (*Paulus I*), 894 F.3d 267 (6th Cir. 2018); *United States v. Paulus* (*Paulus II*), 952 F.3d 717 (6th Cir. 2020). Our prior opinions contain a detailed factual background of the case.

As relevant here, a jury convicted Dr. Richard E. Paulus of one count of healthcare fraud and ten counts of making false statements relating to healthcare. 18 U.S.C. §§ 1035(a)(2), 1347; *Paulus II*, 894 F.3d at 721. The gravamen of the case was that Paulus was performing medically unnecessary procedures. After trial, Paulus made a Rule 29 motion for a judgment of acquittal and a Rule 33 motion for a new trial. Fed. R. Crim. P. 29, 33. The district court granted Paulus's motion for an acquittal on the basis that the evidence was legally insufficient, set aside the jury's guilty verdict, and conditionally granted his motion for a new trial. *United States v. Paulus*, No. CR 15-15-DLB-EBA, 2017 U.S. Dist. LEXIS 32097, 2017

WL 908409, at *1 (E.D. Ky. Mar. 7, 2017). We disagreed, reversed the judgment of acquittal, reinstated the jury's verdict, and vacated the conditional order granting a new trial. *Paulus I*, 894 F.3d at 280.

After remand but before sentencing, a *Brady* issue arose. The government disclosed a document (the "Shields Letter") produced for Paulus's employer (King's Daughters Medical Center (KDMC)) in an independent review of Paulus's medical work. *Paulus II*, 952 F.3d at 722. The Shields Letter indicated that a smaller percentage of Paulus's cases were medically dubious than the government alleged. *Id.* (explaining that the letter was "less consistent with systemic and purposeful fraud and more consistent with occasional mistakes or diagnostic differences of opinion between cardiologists"). The government planned to use the Shields Letter in its case-in-chief before trial, believing it was inculpatory but also recognized that it had exculpatory value. *Id.*

KDMC objected on the grounds that the Shields Letter was privileged and inadmissible. The district court held an *ex parte* hearing and determined that the letter was inadmissible under Federal Rule of Evidence 408 (and made no privilege ruling). *Id.* The government argued that, regardless of admissibility, it was obligated to disclose the letter as *Brady* evidence. *Id.* But the district court disagreed and ordered that the government and KDMC "were not to disclose" any more information about the KDMC review to Paulus. *Id.* (cleaned up). So Paulus knew nothing of the letter until after remand from *Paulus I*.

Paulus moved for a new trial in light of the Shields Letter. *Id.* The district court denied the motion, and we reversed on the ground that the government's failure to disclose the letter violated Paulus's Fifth Amendment due process rights under *Brady*. *Id*. at 724. While we "sympathize[d] with the [government] because . . . the government believed it had an obligation to disclose the Shields Letter to Paulus and did not do so solely because of the district court's order," we reaffirmed that "*Brady* is about the fairness of the trial and not about ferreting out the 'misdeeds of a prosecutor.'" *Id.* (quoting *United States v. Agurs*, 427 U.S. 97, 110 n.17, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)). We vacated Paulus's conviction and remanded for a new trial. *Id.* at 728.

Back in the district court, Paulus moved to dismiss the indictment because a retrial would violate the Double Jeopardy Clause of the Fifth Amendment. Paulus argued that the government's failure to disclose the Shields Letter to us in *Paulus I* constituted fraud on the court, rendering *Paulus I* void, thereby reinstating the district court's grant of acquittal, and thus invoking the Double Jeopardy Clause's protections. The district court denied the motion. The district court reasoned that Paulus "consented to a second trial by moving for both a judgment of acquittal or a new trial." The district court also declined to hold that *Paulus I* was void due to fraud on the Sixth Circuit. Paulus appeals.

II.

We have jurisdiction over "final decisions." 28 U.S.C. § 1291. "In the criminal context, that generally means a defendant may lodge an appeal only after the court imposes a conviction and a sentence." *United States v. Martirossian*, 917 F.3d 883, 886 (6th Cir. 2019). There is a very limited list of exceptions to this general rule. It includes the denial of a motion to dismiss based on the Double Jeopardy Clause, *Abney v. United States*, 431 U.S. 651, 662, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977), but does not include due-process and fraud-on-the-court[1] claims. *See Martirossian*, 917 F.3d at 887. Accordingly, we review only the double jeopardy claim and its "necessary component[s]." *See Richardson v. United States*, 468 U.S. 317, 322, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984).

We review double jeopardy claims de novo. *United States v. Neal*, 93 F.3d 219, 221 (6th Cir. 1996).

III.

The Double Jeopardy Clause states that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The

1. Paulus argues that we should exercise our inherent powers to dismiss actions because of "fraud on the court." *See Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1993). He also argues that the failure to disclose the letter "was an additional violation of Paulus's right to due process" and makes arguments about "ethical violations." We have no jurisdiction over these independent claims in this interlocutory appeal.

Supreme Court has interpreted the Clause as a check against "the vast power of the sovereign" to prohibit "prosecutors . . . treat[ing] trials as dress rehearsals until they secure the convictions they seek." *Currier v. Virginia*, 138 S. Ct. 2144, 2149, 201 L. Ed. 2d 650 (2018). But the Clause is not "an insuperable obstacle to the administration of justice" when there is "no semblance" of "oppressive practices." *Id.* (quoting *Wade v. Hunter*, 336 U.S. 684, 688-89, 69 S. Ct. 834, 93 L. Ed. 974 (1949)). In other words, "the Clause does not guarantee that the state's interest in enforcing the criminal laws against a defendant will be vindicated in a single trial." *Phillips v. Ct. of Common Pleas*, 668 F.3d 804, 811 (6th Cir. 2012).

Paulus argues that a unique confluence of procedural steps, along with prosecutorial misconduct, bring his case within the ambit of the Double Jeopardy Clause. First, the district court granted Paulus's motion for acquittal and we reinstated the conviction. Second, we held that the government should have disclosed the *Brady* evidence before trial, so a new trial was necessary. Neither of these steps in isolation implicate the Double Jeopardy Clause. Paulus thus argues that the government's failure to disclose the potential *Brady* evidence during *Paulus I* is the type of oppressive prosecutorial misconduct that implicates the Clause.

But that argument finds no support in our case law. When a defendant is convicted but gets the conviction set aside, an appellate court may reinstate the original conviction without offending the Double Jeopardy Clause. *United States v. Baggett*, 251 F.3d 1087, 1093 (6th Cir. 2001). Likewise, if a conviction is overturned, retrial is

permissible. *Lockhart v. Nelson*, 488 U.S. 33, 38, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). The remedy for a *Brady* violation is a new trial. *United States v. Presser*, 844 F.2d 1275, 1286 (6th Cir. 1988). And the type of intentional prosecutorial misconduct that implicates the Double Jeopardy Clause has not been extended to *Brady*. *Cf. Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982). Even if we did extend it here, it wouldn't apply in this case for two reasons. First, the rule regarding when intentional prosecutorial misconduct triggers double jeopardy applies to mistrials, and here we have a jury conviction. *United States v. Brown*, 994 F.3d 147, 156 (3d Cir. 2021). Second, not disclosing potential *Brady* material under a court order is not intentionally seeking a new trial. *See Kennedy*, 456 at 676. We affirm the district court.

A.

The district court's grant of Paulus's motion for acquittal doesn't implicate the Double Jeopardy clause. If a jury (or a judge) acquits a defendant, the Double Jeopardy Clause prevents the government from retrying the defendant.[2] *See Tibbs v. Florida*, 457 U.S. 31, 41, 102

2. Paulus argues that this rule applies to his case because *Paulus II* effectively overruled *Paulus I*, thereby reinstating the district court's judgment of acquittal. He reasons that "the first appellate review of this case would have been fundamentally different" if the government disclosed the Shields Letter, concluding that we "would never have reinstated the jury verdict in the first place."

Paulus's arguments make little sense. In *Paulus I*, we held that there was sufficient evidence (without the *Brady* evidence) for

S. Ct. 2211, 72 L. Ed. 2d 652 (1982); *Green v. United States*, 355 U.S. 184, 187-88, 78 S. Ct. 221, 2 L. Ed. 2d 199, 77 Ohio Law Abs. 202 (1957). But when a jury convicts a defendant and the defendant "succeeds in getting his first conviction set aside," then the Clause does not apply. *Lockhart*, 488 U.S. at 38; *accord Green*, 355 U.S. at 189. So when a "district court grants [a] Rule 29 motion *after* the jury renders a guilty verdict, double jeopardy does not bar appeal by the government" because the appellate court can just order that the jury's verdict be reinstated. *Baggett*, 251 F.3d at 1093.

That's what happened in *Paulus I*. The jury convicted Paulus and then the district court set aside that conviction by granting Paulus's Rule 29 motion. We reversed the district court and reinstated the conviction. At that point, the Double Jeopardy Clause was not implicated.

B.

Paulus's successful litigation of his *Brady* claim didn't implicate the Double Jeopardy Clause either. Under *Brady*, prosecutors must disclose material evidence favorable to a defendant. *Brady v. Maryland*, 373 U.S.

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the conviction. In *Paulus II*, we held that the government violated *Brady*. *Paulus II* does not have the effect of invalidating *Paulus I*, nor should it—the issues were entirely distinct. In other words, our holding in *Paulus I* that the evidence was sufficient (without the Shields Letter) has no bearing on whether the evidence at a new trial would be sufficient—that trial hasn't happened yet and we are not the factfinder. Even if the government disclosed the Shields Letter before us in *Paulus I*, the remedy for the *Brady* violation would have been a new trial.

83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *see Paulus II*, 952 F.3d at 724. When a court finds that prosecutors did not disclose such evidence, "[w]e . . . vacate [the] conviction and remand for a new trial." *United States v. Tavera*, 719 F.3d 705, 708 (6th Cir. 2013). We don't order the case to be dismissed on double jeopardy grounds. *Sanborn v. Parker*, 629 F.3d 554, 580 (6th Cir. 2010) ("What the Double Jeopardy Clause manifestly does *not* do, however, is protect a defendant from retrial after he has succeeded in obtaining a reversal on appeal because of errors committed at trial . . . ."). This case is no different.

"The decisions which have construed the *Brady* doctrine make it absolutely clear that the remedy for a *Brady* violation is a new trial . . . ." *Presser*, 844 F.2d at 1286; *see Kyles v. Whitley*, 514 U.S. 419, 422, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (noting that when a defendant proves a *Brady* violation, they are "entitled to a new trial"). So after Paulus "succeeded in getting his first conviction set aside" on *Brady* grounds, the Double Jeopardy Clause was not implicated. *Lockhart*, 488 U.S. at 38.

C.

Paulus argues that the alleged prosecutorial misconduct in *Paulus I*, considered together with his vacated judgment of acquittal and the *Brady* violation, require dismissal under the Double Jeopardy Clause. We disagree.[3]

3. Paulus argues that the district court incorrectly held that he "waived" his double jeopardy objections by "consenting" to a

Appendix A

Prosecutorial misconduct and double jeopardy sometimes intersect. *See Kennedy*, 456 U.S. at 676. The intersection, at least as currently explored, concerns mistrials. The general rule is that when a defendant moves for a mistrial, the defendant waives his right to have his

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new trial. As far as waiver is concerned, the district court focused on cases involving mistrials and acquittals. *See, e.g., United States v. Scott*, 437 U.S. 82, 99, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978) (holding that the Double Jeopardy Clause doesn't prohibit retrial of a defendant after a defendant successfully moves for a mistrial because "[the defendant] was . . . neither acquitted nor convicted, because he himself successfully undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury"). To Paulus, *Burks v. United States* disallows such waiver. In *Burks*, the Supreme Court held that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). The Court said that one could not "waive his right to a judgment of acquittal by moving for a new trial." *Id.* (cleaned up).

But here, the jury found Paulus guilty and we held that the evidence was legally sufficient. There is no judgment of acquittal for Paulus to waive because we reinstated the guilty verdict in *Paulus I*, and there was no mistrial. Thus, *Burks* does not directly apply, and we don't reach whether Paulus waived any double jeopardy objection because we hold his substantive arguments to be without merit. *See Ball v. United States*, 163 U.S. 662, 672, 16 S. Ct. 1192, 41 L. Ed. 300 ("[I]t is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside may be tried anew . . . for the same offense of which he had been convicted."); *see also United States v. Dinitz*, 424 U.S. 600, 609 n.11, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976) ("This Court has implicitly rejected the contention that the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right.").

"trial completed before the first jury empaneled to try him." *Id.* at 673. The *Kennedy* exception is that a defendant cannot be retried if the government intentionally "goads" a defendant's mistrial motion because the government wants a new trial. *Id.*; *see Phillips*, 668 F.3d at 811. But the bar is high. *See United States v. White*, 914 F.2d 747, 752 (6th Cir. 1990) (holding that deliberate conduct borne from prosecutorial inexperience that elicits a mistrial is insufficient). The question is whether the government intentionally maneuvered in "an attempt . . . to seek a second bite at the apple." *United States v. Foster*, 945 F.3d 470, 475 (6th Cir. 2019).

We construe Paulus's argument as encouraging us to import the *Kennedy* exception into the *Brady* context and beyond the mistrial context. We decline the invitation for two reasons. First, "we do not believe the [Double Jeopardy Clause] may be invoked to supplement the remedies contemplated by *Brady*." *United States v. Coleman*, 862 F.2d 455, 458 (3d Cir. 1988). The two strands of case law cannot be combined in this way because they have different underpinnings. Double jeopardy "places a premium upon the defendant's right to one prosecution" while "due process [(*Brady*)] simply requires that the defendant be treated fairly." *Id.* at 458. Under *Brady*, a defendant is treated fairly when the evidence is ultimately disclosed, so "the most an invocation of *Brady* c[an] accomplish [is] the ordering of a new trial" that includes the new information.[4] *United States v. Davis*, 578 F.2d

4. We recognize that in *Government of Virgin Islands v. Fahie*, the Third Circuit noted that "[w]hile retrial is normally the most severe sanction available for a *Brady* violation, where a

277, 280 (10th Cir. 1978); *accord United States v. Lewis*, 368 F.3d 1102, 1107 (9th Cir. 2004). Otherwise, the Double Jeopardy Clause would effectively prohibit retrials after all *Brady* violations.

Second, even if we applied the *Kennedy* exception here, Paulus wouldn't meet it. Courts have discussed extending *Kennedy* beyond mistrials in dicta, but the intent requirement would remain. *See United States v. Wallach*, 979 F.2d 912, 916 (2d Cir. 1992) (assuming that a prosecutor would have to intend to "prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct"). "[P]rosecutorial behavior will bar a second trial only where such behavior was intentionally calculated to cause or invite mistrial." *United States v. Thomas*, 728 F.2d 313, 318 (6th Cir. 1984) (cleaned up), *abrogated on other grounds by United States v. Carroll*, 26 F.3d 1380 (6th Cir. 1994); *see Smith v. Coleman*, 521 F. App'x 444, 448 (6th Cir. 2013) (noting *Wallach*'s dicta about the reach of *Kennedy* but reaffirming that "the only relevant intent to the double jeopardy inquiry is the prosecutor's intent to terminate the trial, not intent to secure a conviction" (cleaned up)).

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defendant can show both willful misconduct by the government, and prejudice, dismissal may be proper." 419 F.3d 249, 255 (3d Cir. 2005). But the court was quick to note that the Double Jeopardy clause was likely not implicated. "[T]he Double Jeopardy Clause normally will not limit the range of remedies available for a *Brady* violation" because a defendant would need to show that "the government intentionally triggered a mistrial by withholding documents." *Id.* n.8 (citing *Kennedy*, 456 U.S. at 676).

It's hard to see how a *Brady* violation could meet the intent requirement. That would necessitate a finding that the government failed to disclose material evidence (usually before trial) to save a potential "second bite at the apple" (but only if necessary). *See Foster*, 945 F.3d at 475; *United States v. Ivory*, 29 F.3d 1307, 1310 (8th Cir. 1994) (restating the district court's reasoning that "even if *Oregon v. Kennedy* applied [to *Brady*], [the] defendant made no showing that the prosecution had attempted to invoke a mistrial" and holding that the defendant failed to state a colorable double jeopardy claim); *United States v. Colvin*, 138 F. App'x 816, 821 (6th Cir. 2005) (applying *Kennedy*'s intent test to a *Brady* violation and holding the test unmet).

But we need not decide whether the *Kennedy* exception can ever apply to *Brady* violations because this case involves neither a mistrial nor intent by the prosecutor to place Paulus under new jeopardy. First, the prosecution did not try to trigger a mistrial. Paulus focuses on the prosecution's nondisclosure of the Shields Letter to us in *Paulus I*. But in *Paulus I*, a jury had already convicted Paulus. So the prosecution did not intend to trigger a new trial, thus putting Paulus in new jeopardy, because they were seeking a reinstatement of the original conviction. Second, as far as the potentially offensive prosecutorial misconduct that was the original *Brady* violation, it was not intentional. The record shows that the prosecution wanted to disclose the *Brady* material, but the district court ordered them not to. *Paulus II*, 952 F.3d at 722. That is not intentional prosecutorial misconduct designed to trigger a new trial. So even if we applied the *Kennedy* exception here, Paulus would not meet it.

IV.

The district court is **AFFIRMED**.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, NORTHERN DIVISION AT ASHLAND, FILED SEPTEMBER 1, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT ASHLAND

CRIMINAL ACTION NO. 15-15-DLB-EBA

UNITED STATES OF AMERICA,

Plaintiff

v.

RICHARD E. PAULUS, M.D.,

Defendant

September 1, 2020, Decided
September 1, 2020, Filed

MEMORANDUM OPINION AND ORDER

This matter is before the court on the Motion to Dismiss filed by Defendant Dr. Richard Paulus. (Doc. # 424). Specifically, Dr. Paulus asks for the Indictment against him to be dismissed "because a retrial would violate the Fifth Amendment's prohibition against double jeopardy." *Id.* at 1. The Motion having been fully briefed, (Docs. # 426 and # 427), it is now ripe for the Court's

review. For the reasons set forth herein, the Motion to Dismiss must be **denied**.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND[1]

The factual and procedural history of this case is extensive and spans nearly a decade. Over four years before Dr. Paulus was indicted on charges related to health care fraud, the United States was investigating potentially unnecessary cardiac stent procedures performed by Dr. Paulus at the King's Daughter Medical Center ("KDMC"). (Doc. # 374 at 1-2). On September 3, 2015, the investigation resulted in an Indictment that charged him with twenty-seven counts related to committing health care fraud and making false statements. (Doc. # 1). Specifically, Paulus was accused of exaggerating the extent of blockages in his patients' arteries so he could perform and bill for medically unnecessary cardiac stent procedures. *Id.* at 10-11.

Dr. Paulus proceeded to trial on these charges in September of 2016. *See* (Doc. # 191). At the close of the Government's case-in-chief, Paulus filed a Motion for Judgment of Acquittal. (Doc. # 220). Pursuant to this Motion, eleven false-statement counts were dismissed for lack of evidence, and the consideration of the Motion as to

1. The underlying facts of this case have been set forth in detail by the District Court in previous opinions and by the Sixth Circuit on appeal and will not be revisited in detail herein. *See* (Docs. # 318, # 325, and # 402); *United States v. Paulus* (*Paulus II*), 952 F.3d 717 (6th Cir. 2020); *United States v. Paulus* (*Paulus I*), 894 F.3d 267 (6th Cir. 2018).

the other counts was deferred pursuant to Rule 29(b) of the Federal Rules of Criminal Procedure. (Doc. # 225). On October 28, 2016, after twenty-three days of trial and four days of deliberations, a jury convicted Paulus of one count of health care fraud in violation of 18 U.S.C. § 1347, and ten counts of making false statements relating to health care matters in violation of 18 U.S.C. § 1035.[2] (Doc. # 276). After his conviction, Paulus renewed his Motion for Judgment of Acquittal, (Doc. # 263), and filed his first Motion for a New Trial, (Doc. # 298).

On March 7, 2017, the Court granted Paulus's Motion for Judgment of Acquittal, denied the Renewed Motion for Judgment of Acquittal as moot, and conditionally granted the Motion for a New Trial. (Docs. # 318 and # 319). However, on June 25, 2018, the Sixth Circuit reversed and reinstated the jury's verdict, finding that the Government produced sufficient evidence to support the guilty verdict. *See Paulus I*, 894 F.3d 267. The Sixth Circuit also vacated the conditional Order granting a new trial and remanded for reconsideration. *Id.* The Mandate issued on July 19, 2018, restoring jurisdiction over the matter to this Court.

On remand, this Court denied a new trial based upon the Sixth Circuit's ruling and set the matter for sentencing. (Docs. # 344 and # 362). Prior to sentencing, however, Dr. Paulus moved for a new trial for the second time, this time arguing that newly discovered evidence, a *Brady* violation, and a Sixth Amendment violation arising out of *ex parte* proceedings necessitated a new

2. The jury acquitted Paulus on five other false-statement counts brought under 18 U.S.C. § 1035. (Doc. # 276).

trial. (Doc. # 366). Specifically, the Motion centered around a letter ("Shields letter") discussing a review of Dr. Paulus's work undertaken by independent experts hired by KDMC ("KDMC Review"), which indicated that approximately 7% of Dr. Paulus's procedures were unnecessary. *See generally id.* Dr. Paulus argued that the Shields letter was *Brady* material which called into question the Government's evidence at trial, and that an *ex parte* hearing during which the Court ordered that the Shields letter not be disclosed to the Defendant violated his Sixth Amendment right to counsel. *Id.* The Court rejected these new arguments and proceeded to deny Paulus's second Motion for a New Trial. (Doc. # 374).

On May 2, 2019, Dr. Paulus was sentenced to 60 months of imprisonment followed by three years of supervised release. (Docs. # 378 and # 379). He was also ordered to pay over one-million dollars in restitution and a special assessment. (Doc. # 379). Dr. Paulus appealed the Judgment to the Sixth Circuit. On appeal, Dr. Paulus raised a number of issues, including those related to the *ex parte* conference which was the subject of his second Motion for New Trial. *Compare* Brief for Appellant, *Paulus II*, 952 F.3d 717 (No. 19-5532), 2019 WL 3855507, *with* (Doc. # 366). Dr. Paulus requested that the Circuit overturn his conviction and remand the case for a new trial. Brief for Appellant, *Paulus II*, 952 F.3d 717 (No. 19-5532), 2019 WL 3855507, at *20 (arguing that "Paulus's conviction must be reversed and a new trial ordered"). The Circuit Court did just that—vacating the conviction and remanding the case back to this Court for a new trial. (Docs. # 402 and # 410); *Paulus II*, 952 F.3d 717.

Following remand, Dr. Paulus filed the instant Motion to Dismiss. (Doc. # 424). In his Motion, Dr. Paulus argues that the Indictment must be dismissed because a retrial at this point would violate the Double Jeopardy Clause of the Constitution as he was previously acquitted by the undersigned. *See* (Doc. # 424). He argues, among other things, that the acquittal should stand and that the Sixth Circuit's decision overturning the acquittal (*Paulus I*) should be considered void in light of the Government's alleged fraudulent actions before the Sixth Circuit in failing to disclose *Brady* evidence. *Id.* The Government opposes the Motion and asserts that retrial is the appropriate remedy for the *Brady* violation, which is one of the bases of the Sixth Circuit's decision (*Paulus II*) vacating the conviction and remanding the matter for a new trial. *See* (Doc. # 426). The Government further suggests that the Motion to Dismiss is frivolous and that there is no basis, fraud or otherwise, for treating the Sixth Circuit's decision in *Paulus I* as void. *Id.*

II. ANALYSIS

A. The Double Jeopardy Clause

The Double Jeopardy Clause of the United States Constitution states that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Clause "protects the individual against 'a second prosecution for the same offense after conviction or acquittal, and against multiple punishments for the same offense.'" *United States v. Goff*, 187 F. App'x 486, 491 (6th Cir. 2006) (quoting *United States v. Turner*, 324 F.3d 456, 461 (6th Cir. 2003)). The purpose of the

Clause is to "ensure that 'the state with all its resources and power [shall] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity." *Id.* at 491-92 (quoting *United States v. Sinito*, 723 F.2d 1250, 1255 (6th Cir. 1983)); *see also United States v. Martin Linen Supply Co*, 430 U.S. 564, 569 (1977) ("[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its vital interest in the enforcement of criminal laws." (alteration in original) (quoting *United States v. Jorn*, 400 US. 470, 479 (1971))); *United States v. Pi*, 174 F.3d 745, 748 (citing *Green v. United States*, 355 U.S. 184, 187 (1957)). Additionally, it seeks to ensure that "the Government, with its vastly superior resources, [does not] wear down the defendant [with a second trial after acquittal] so that even though innocent he may be found guilty." *Evans v. Michigan*, 568 U.S. 313, 319 (2013) (quoting *United States v. Scott*, 437 U.S. 82, 91 (1978)).[34]

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3. The denial of a colorable Motion to Dismiss on double jeopardy grounds is immediately appealable to a court of appeals because "[a] defendant's right under the Fifth Amendment not to be put twice in jeopardy for the same offense would be lost irreparably if the right could be raised only following conviction at a second trial." *Pi*, 174 F.3d at 747-48 (citing *United States v. MacDonald*, 435 U.S. 850, 862 (1978)); *see also Will v. Hallock*, 546 U.S. 345, 350 (2006) ("[A] criminal defendant may collaterally appeal an adverse ruling on a defense of double jeopardy." (citing *Abney v. United States*, 431 U.S. 651, 660 (1977))).

4. There are very limited circumstances through which a defendant may be tried a second time for the same offense. "A new

Appendix B

An acquittal holds special significance in the double jeopardy realm. *Evans*, 568 U.S. at 319 (citing *Scott*, 437 U.S. at 91)); *Martin Linen Supply Co.*, 430 U.S. at 571 ("Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and therefore violating the Constitution.'" (alterations in original) (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896))). The significance of an acquittal to double jeopardy holds true regardless of whether the defendant is acquitted by a judge or a jury. *Evans*, 568 U.S. at 318 ("An acquittal is unreviewable whether a judge directs a jury to return a verdict of acquittal, or forgoes that formality by entering a judgment of acquittal herself." (citations omitted)); *Smith v. Massachusetts*, 543 U.S. 462, 467 (2005) ("[W]e have long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination by an acquittal by jury verdict. This is so whether the judge's ruling of acquittal comes in a bench trial or . . . in a trial by jury." (extensive citations omitted)); *Martin Linen Supply Co*, 430 U.S. at 573-75. Additionally, it remains true even when the judgment of

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[second] trial is permitted, *e.g.*, where the defendant successfully appeals his conviction, where a mistrial is declared for a manifest necessity, where the defendant requests a mistrial in the absence of prosecutorial or judicial overreaching, or where an indictment is dismissed at the defendant's request in circumstances functionally equivalent to a mistrial." *Sanabria v. United States*, 427 U.S. 54, 63 at n.15 (1978) (internal citations omitted).

acquittal was made in error.[5] *Evans*, 568 U.S. at 318 ("It has been half a century since we first recognized that the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is 'based upon an egregiously erroneous foundation.' A mistaken acquittal is an acquittal nonetheless . . . ." (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (*per curiam*))).

The clear prohibition on successive trials by the Double Jeopardy Clause is evidenced by the strict limitations on appeals from a judgment of acquittal. Yet, the double jeopardy clause does not always prevent an appeal of the acquittal. *See Martin Linen Supply Co.*, 430 U.S. at 568-69 ("The development of the Double Jeopardy Clause from its common-law origins . . . suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial." (alteration in original) (quoting *United States v. Wilson*, 420 U.S. 332, 342 (1975))). Appeals of acquittals arise in the context of Federal Rule of Criminal

5. Specifically, the Supreme Court has held that "an acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence, a mistaken understanding of what evidence would suffice to sustain a conviction, or a 'misconstruction of the statute' defining the requirements to convict." *Evans*, 568 U.S. at 318 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 203 (1984) and citing *Sanabria*, 437 U.S. at 68-69; *Smith*, 543 U.S. at 473; *Smalis v. Pennsylvania*, 476 U.S. 140, 144-45, n. 7 (1986)). In sum, "the fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, *but it does not alter its essential character." Id.* (emphasis added) (quoting *Scott*, 437 U.S. at 98); *see also id.* at 320, 328-29.

Procedure 29. Rule 29 allows a district court judge to enter a judgment of acquittal after the prosecution's case in chief, after the presentation of all evidence, after a "jury has returned a guilty verdict," or after a "jury has failed to return a verdict." FED. R. CRIM. P. 29. When a "district court grants a motion for judgment of acquittal *prior* to the jury's verdict, double jeopardy bars further prosecution because reversal of such judgment on appeal *would necessitate retrial of the defendant.*" *United States v. Baggett*, 251 F.3d 1087, 1093 (6th Cir. 2001) (second emphasis added) (citing *Scott*, 437 U.S. at 91). However, where "the district court grants the Rule 29 motion *after* the jury renders a guilty verdict, double jeopardy does not bar appeal by the government" because "[i]n that situation a conclusion by the appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial." *Id.* (quoting *Scott*, 437 U.S. at 91 n.7); *see also Smith*, 543 U.S. at 467 (citing *Wilson*, 420 U.S. at 352-53)); *Martin Linen Supply Co.*, 430 U.S. at 570. Rather, in such a situation "the error can be corrected on remand by the entry of a judgment on the verdict." *Baggett*, 251 F.3d at 1093 (quoting *Scott*, 437 U.S. at 91 n.7); *see also Martin Linen Supply Co.*, 430 U.S. at 570. In other words, a judgment of acquittal may only be appealed if resolution of the appeal would not require the defendant to be retried.

The Court has identified one limited exception through which a defendant may be retried after a judge sets aside a verdict and grants a judgment of acquittal pursuant to Rule 29. Under Rule 29(d), if the defendant files a motion for new trial contemporaneously with a motion for acquittal,

and if the court grants the motion for acquittal, "the court must also conditionally determine whether any motion for new trial should be granted if the judgment of acquittal is later vacated or reversed." FED. R. CRIM. P. 29(d)(1). In the event that the court conditionally grants the motion for new trial and, on appeal, "the appellate court later reverses the judgment of acquittal, *the trial court must proceed with the new trial [despite the earlier, initial acquittal] unless the appellate court orders otherwise.*" FED. R. CRIM. P. 29(d)(1)(3)(A) (emphasis added).

The allowance of this successive trial seems to turn on the fact that the defendant *consented to a second trial* by moving for both a judgment of acquittal *or a new trial*, despite the rights afforded by the Double Jeopardy Clause. *Cf. Currier v. Virginia*, 138 S. Ct. 2144, 2150-52 (2018) (suggesting that a defendant can consent to a second trial following an acquittal and that the consent is valid even when the defendant feels as though there is no choice but to pursue a second trial); *Evans*, 568 U.S at 326 (indicating that, "when a defendant persuades the court to declare a mistrial . . . the defendant consents to a disposition that contemplates reprosecution" as opposed to a "defendant [who] moves for acquittal [who] does not"); *Scott*, 437 U.S. at 99 (finding, in the context of a defendant moving for "termination of the proceedings . . . on a basis unrelated to factual guilt or innocence of the offense of which he is accused" that "the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice"); *see also United States v. Dinitz*, 424 U.S. 600, 609 n.11 (1976) ("This Court has implicitly rejected the contention

that the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right." (collecting cases)); *United States v. Dixon*, 658 F.2d 181, 187 (3rd Cir. 1981) ("If appellee is retried following our reinstatement of the verdict, it will be the result of *his own motion for a new trial*, and not a process imposed upon him by the Government or this court." (emphasis added)). Put simply, a second trial is permissible when the defendant consents to such a trial that might otherwise be barred by double jeopardy.

B. A Retrial of Dr. Paulus Is Not Barred by Double Jeopardy

The procedural history of this case is tortured and certainly complicates the evaluation of Dr. Paulus's instant motion. To reiterate, at the trial level, Dr. Paulus was acquitted via a Rule 29 Motion, (Doc. # 318), and a Judgment of Acquittal was entered, (Doc. # 319). Additionally, however, the Court conditionally granted Dr. Paulus's first Motion for New Trial. (Doc. # 318). The United States then filed a Notice of Appeal. (Doc. # 322).

The Sixth Circuit, in *Paulus I*, reinstated the jury's guilty verdict, finding that "[t]he government produced sufficient evidence to support the guilty verdict." 894 F.3d at 280. The Circuit Court also, however, *vacated* this Court's prior Order conditionally granting Defendant's Motion for New Trial and remanded the case for reconsideration of the Motion for New Trial in light of

Paulus I.[6] *Id.* On remand, the undersigned ultimately denied the initial Motion for New Trial. (Doc. # 344). An additional Motion for New Trial was filed by Dr. Paulus prior to sentencing, which was also denied. (Docs. # 366 and # 374). Following sentencing, Dr. Paulus appealed his Judgment on a number of grounds. (Doc. # 383). The Sixth Circuit ultimately vacate Dr. Paulus's conviction and remanded the case for a new trial. *Paulus II*, 952 F.3d at 728.

The Supreme Court has made clear that an acquittal at the trial court level, no matter how erroneous, effectively precludes a second trial. *See Evans*, 568 U.S. at 318, 320, 328-29 (citations omitted). Even if an acquittal is ultimately overturned on appeal and a conviction reinstated, it is clear that a second trial is *still barred* by the Double Jeopardy Clause. *Baggett*, 251 F.3d at 1093 (citations omitted). It is obvious from the unequivocal language used by the Supreme Court that an acquittal, even if overturned, is to be accorded great weight and that the guarantee of the Double Jeopardy Clause which prevents a second trial after acquittal is to be applied strictly.

The Court finds, however, that the limited exception allowing a second trial when the Defendant consents to one, is applicable here. Soon after trial, Dr. Paulus

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6. Had the Order conditionally granting Defendant's initial Motion for New Trial not been vacated, the case would have immediately been remanded for a second trial, FED. R. CRIM. P. 29(d)(1)(3)(A), which would not have violated the Double Jeopardy Clause, *see Dixon*, 658 F.2d at 187 (citing *Scott*, 437 U.S. at 91).

requested, and thus effectively consented to, a new trial. (Doc. # 298). Though that initial request was ultimately denied, (Doc. # 344), he again requested a new trial prior to his sentencing, (Doc. # 366). That request was also denied. (Doc. # 374). Not surprisingly, on appeal Dr. Paulus argued that the Sixth Circuit should reverse his convictions and remand the case a new trial. *See, e.g.*, Brief for Appellant, *Paulus II*, 952 F.3d 717 (No. 19-5532), 2019 WL 3855507, at *20 (arguing that "Paulus's conviction must be reversed and a new trial ordered"); (Doc. # 424-1 at 39) (counsel for Dr. Paulus asking during oral argument before the Sixth Circuit that "this court remand the case back to Judge Bunning with instructions to order a new trial."). Those requests were ultimately granted. *Paulus II*, 952 F.3d at 728. The fact that Dr. Paulus made his most recent request for a new trial to the Circuit Court, rather than this Court, is of no consequence.[7]

Reading the relevant Supreme Court cases in tandem, it appears clear that a request for new trial is sufficient to indicate consent to a second trial—even after an acquittal—without running afoul of the Double Jeopardy

7. The Defendant has failed to put forth case law, and the Court has found none, supporting Defendant's contention that that he "was required to make a *pro forma* request for a reversal of his conviction and a new trial" so "[t]he new trial request and remand in *Paulus II* are irrelevant to the constitutional double jeopardy violation that a second trial would create." (Doc. # 427 at 5). The Court is not persuaded by Dr. Paulus's suggestion that a new trial is not the remedy he seeks, despite requesting a new trial at least three times at both the district and circuit court levels. *See* (Docs. # 298 and # 366); Brief for Appellant at 32, *Paulus II*, 952 F.3d 717 (No. 19-5532), 2019 WL 3855507, at *20.

Clause. *See Currier*, 138 S. Ct. at 2150-52; *Evans*, 568 U.S at 326; *Scott*, 437 U.S. at 99; *see also Dixon*, 658 F.2d at 187. Moreover, Dr. Paulus's continued requests for a new trial throughout these proceedings, *see* (Docs. # 298 and # 366); Brief for Appellant, *Paulus II*, 952 F.3d 717 (No. 19-5532), 2019 WL 3855507, at *20, clearly indicate consent for a second trial to take place. Accordingly, the Court finds that Dr. Paulus consented to a second trial and, therefore, proceeding with a second trial in this case will not violate his rights under the Double Jeopardy Clause. Even more so, the Sixth Circuit remanded this case for a new trial, *Paulus II*, 953 F.3d at 728, and the Court is unaware of any jurisprudence permitting it to disregard an order of a reviewing appellate court.

C. Defendant's Remaining Arguments Fail

Dr. Paulus additionally argues that the Sixth Circuit's decision in *Paulus I* should be treated as void, and its Order reinstating the guilty verdict of the jury "has no force." (Doc. # 424 at 10-14). Specifically, he claims that *Paulus II* overrules *Paulus I* or that *Paulus I* is void, because the Government committed fraud on the Sixth Circuit and violated Paulus's due process rights by failing to disclose the Shields letter during the initial appeal, and because the Sixth Circuit likely would have affirmed the Judgment of Acquittal had the Shields letter been in evidence. *Id.* at 10-15. Thus, Dr. Paulus seems to claim that the Judgment of Acquittal stands and "must be respected." *Id.* at 15. In sum, he effectively argues that, for a number of reasons, this Court should ignore *Paulus I*, a published decision of the United States Court of Appeals for the Sixth Circuit, and act as if Paulus remains acquitted.

First, the Court finds that speculation about how the Sixth Circuit would have ruled in *Paulus I* in the event the Shields letter was in evidence to be a fruitless exercise that it declines to engage in. To do so, the undersigned would be simply guessing as to whether the Circuit would have come to a different conclusion; such conjecture would be a poor use of judicial time and resources. The panel *itself* questioned during oral argument whether disclosure of the Shields letter would have changed the outcome of *Paulus I*. *See* (Doc. # 424-1 at 15) ("[I]t's hard to figure out whether our ruling in connection with the government's appeal of acquittal would have been different had we known the whole story."). If the decision makers themselves are unclear as to whether and how the outcome would have changed, the Court is hard pressed to understand how it could come to an accurate conclusion about whether the outcome of *Paulus I* would have changed had the Shields letter been part of the record evidence that the Circuit reviewed. *See United States v. Abner*, 35 F.3d 251, 253 (6th Cir. 1994) (explaining that the Circuit, when reviewing "claims for sufficiency of the evidence to support a conviction" including the "denial of a judgment of acquittal," must consider the *evidence in the record* "in the light most favorable to the prosecution" (citations omitted)).

Additionally, the Court is unaware of any case law that would allow it to effectively void the opinion of a reviewing appellate court, regardless of the alleged circumstances leading up to the appellate court's decision. In fact, the jurisprudence says just the opposite; a district court must follow the precedent established by the reviewing appellate courts. *United States v. Evans*, 795 F. App'x 956, 958 (6th Cir. 2019) ("Neither we nor the district court are at liberty

to ignore or overturn our published precedent, much less that of the Supreme Court" (citing *United States v. Burris*, 912 F.3d 386, 406 (6th Cir. 2019))); *Valentine v. Francis*, 270 F.3d 1032, 1035 (6th Cir. 2001) (explaining that prior Circuit precedent is "controlling authority" for subsequent panels at the Circuit as well as for the district court); *see also United States v. Torres*, 869 F.3d 1089, 1100 (9th Cir. 2017) ("[T]he district court does not have the authority to ignore circuit court precedent." (quoting *Mohamed v. Uber Tech., Inc.*, 828 F.3d 1021, 1211 (9th Cir. 2016))); *United States v. Chavez*, 151 F. App'x 302, 310 (5th Cir. 2005) ("The district court was not free to ignore [circuit] precedent." (quoting *United States v. Willis*, 38 F.3d 170, 179 (5th Cir. 1994))). Moreover, the Sixth Circuit—in fact the same panel of judges—did not take the opportunity in *Paulus II* to overrule *Paulus I*. *See Paulus II*, 952 F.3d 717. Thus, Dr. Paulus's suggestion that the Court should essentially ignore *Paulus I* and consider the Judgment of Acquittal to stand, regardless of the reason,[8] is meritless, as this Court has no authority to overrule, ignore, or void a decision of the Sixth Circuit.

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8. The Court need not hold an evidentiary hearing about the Government's conduct as it relates to the Shields letter as Dr. Paulus requests, *see* (Docs. # 424 at 16-17 and # 427 at 9), because, regardless of the factual evidence presented at such a hearing, the Court does not have the authority to void a decision of the Sixth Circuit, *see Bryan v. United States*, 721 F.2d 572, 577 (6th Cir. 1983) ("[T]here is no reason to conduct an evidentiary hearing to resolve a purely legal issue."); *McCaleb v. Gansheimer*, No. 1:05 CV 2587, 2006 WL 2404068, at *5 (N.D. Ohio Aug. 18, 2006) ("Petitioner is not entitled to an evidentiary hearing since Petitioner's claims involve legal issues that can be independently resolved without additional factual inquiry.").

Accordingly, for the reasons set forth herein,

IT IS ORDERED that Defendant Dr. Richard E. Paulus's Motion to Dismiss (Doc. # 424) is **DENIED. This is a final and appealable Order.**

This 1st day of September, 2020.

Signed By:
David L. Bunning
United States District Judge