No. 21-740

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

REPLY BRIEF

C. DAVID MUSSETTER
MUSSETTER LAW OFFICE
P.O. Box 192
2709 Louisa Road #1
Catlettsburg, KY 41129
(606) 931-0050

ROBERT S. BENNETT
Counsel of Record
HILARY H. LOCICERO
PEGGY G. BENNETT
BENNETT LOCICERO
& LIU LLP
1707 L Street NW, Suite 1030
Washington, DC 20036
(202) 880-2129
rsbennett@bllfirm.com

Counsel for Petitioner

312062

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

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

INTRODUCTION

In its Opposition, the government misdirects the Court's focus and mischaracterizes the record. Respondent insists that Petitioner is improperly asking the Court to grant him additional relief beyond a new trial to address the prosecutors' violation of *Brady v. Maryland*, 373 U.S. 83 (1963), during his first trial. In truth, this petition focuses on the prosecutors' constitutional and ethical violations during the government's appeal of Petitioner's acquittal – which occurred *in addition to* the trial-level *Brady* violation – and the Sixth Circuit's refusal to consider that misconduct as part of Petitioner's double jeopardy claim. Respondent has not identified any precedent supporting the Sixth Circuit's unduly narrow application of the collateral order doctrine, nor reconciled it with *Richardson v. United States*, 468 U.S. 317, 322 (1984) or *United States v. Washington*, 549 F.3d 905, 911 (3d Cir. 2008).

If the decision below stands, Petitioner will face trial a second time without ever having an untainted appellate review of his post-trial judgment of acquittal. Future criminal defendants will remain vulnerable to the same machinations: if a district court makes a patently erroneous *Brady* ruling without the defendant's knowledge, prosecutors will be able to weaponize the error by making affirmative arguments that they know are undermined by the exculpatory evidence they alone possess. They will have license to use this tactic to induce reversal of post-trial acquittals, and the Double Jeopardy Clause will be betrayed.

While this Court cannot give Petitioner the last five years of his life back, it can at least determine the appropriate remedy for the prosecutorial gamesmanship that occurred here and thereby prevent its repetition. The detailed record here provides an ideal vehicle to do so.

ARGUMENT

I. RESPONDENT'S CHARACTERIZATION OF THE RECORD IS MISLEADING

In its effort to paint this case as one involving an unremarkable *Brady* violation, Respondent mischaracterizes several aspects of the record.

1. Respondent misrepresents the district court's ruling regarding the exculpatory information at issue. The government claims the district court "took the view… that [the KDMC Review's 7% rate of disagreement] would not be exculpatory" and ordered the government not to disclose the information. Opp. at 7. Respondent also claims the district court deemed the information "not ultimately material." *Id.* at 12. Neither representation is accurate. The district court's ruling rested on whether the letter conveying the information would be admissible at trial, not whether the information was exculpatory or material. Hearing Tr., R.303/PageID#11972-11973. The district court concluded that because the evidence was inadmissible, disclosure was not required, a ruling the parties agree was erroneous. *Id.*/PageID#11986-11987; Order R.163/PageID#3458-3459. The district court's ruling in no way excuses the prosecutors' decision to withhold the exculpatory information from the Sixth Circuit. Moreover, the government's *ex parte* motion and the *ex parte* hearing transcript show that the

prosecutors fully appreciated the letter's exculpatory nature. The proof of this is in the proverbial pudding, as the government repeatedly made arguments at trial *and on appeal* that were directly contradicted by the withheld evidence. Respondent's claim that the government had a "good-faith basis" to conclude it was immaterial, Opp. at 27, is meritless.

2. Respondent misrepresents the way the prosecutors capitalized on the district court's error. Incredibly, the government claims it "had not argued at trial that [the procedures it selected for presentation] represented a random sample or that the rate of unnecessary procedures was inculpatory." Opp. at 12. But at trial and on appeal, the government argued that the high frequency with which its experts disagreed with Petitioner's angiogram interpretations raised an inference of fraud. At oral argument in *Paulus II* (*United States v. Paulus*, 952 F.3d 717 (6th Cir. 2020)), the government conceded that the supposedly high rate of unnecessary procedures was the main inculpatory factor upon which the government sought reversal of Petitioner's acquittal. *See* Pet. at 19. The prosecutors' refrain was that they had presented evidence of a pattern, and that fictionalized pattern became the linchpin of the Sixth Circuit's decision in *Paulus I*. *See United States v. Paulus*, 894 F.3d 267, 278 (6th Cir. 2018) ("At the end of the government's case, a reasonable jury could be left with the impression that the problems in this case came from a lengthy pattern of fraudulent over-diagnosing by Paulus."). The prosecutors did not simply fail to notify the Sixth Circuit of the existence of the exculpatory 7% result – they made affirmative arguments they knew were unsupportable given that result and their own cherry-picked expert reviews.

3. Respondent claims the Sixth Circuit considered the government's conduct during the first appeal and absolved it of wrongdoing. Not so. The Sixth Circuit wrote in *Paulus II* that it did not fault the government for failing to disclose the exculpatory content *at trial*, but did not excuse its conduct during the *Paulus I* appeal. Pet. App. 13a ("Second, as far as the potentially offensive prosecutorial misconduct *that was the original Brady violation*, it was not intentional.") (emphasis added). During oral argument in the *Paulus II* appeal, all three of the appellate judges condemned the government's lack of candor to the tribunal. Their concern was so pronounced that it prompted Respondent's appellate counsel to self-report to the Justice Department's Office of Professional Responsibility.

II. THIS CASE PRESENTS AN IDEAL VEHICLE FOR THE COURT TO CLARIFY THE INHERENT POWERS OF FEDERAL COURTS IN CRIMINAL CASES

The threshold question presented is whether the Sixth Circuit erred in refusing to consider Petitioner's allegations of fraud upon the court as part of his double jeopardy claim. Respondent disputes the premise of the question, asserting that the Sixth Circuit did consider those allegations. But the Sixth Circuit clearly stated that it lacked interlocutory jurisdiction over Petitioner's fraud on the court claim. Pet. App. 5a, n.1. The Court should review that decision to clarify the rights of defendants and prevent erosion of the protections afforded by the Double Jeopardy Clause.

Review of this issue is necessary to resolve a circuit conflict. Respondent claims there is no meaningful disagreement amongst the circuits regarding the proper treatment of fraud on the court allegations. To the contrary, there is considerable confusion about whether the lower courts have inherent authority to correct judgments obtained by way of fraud in criminal cases. *See United States v. Smiley*, 553 F.3d 1137 (8th Cir. 2009) (describing varying approaches). The most extensive analysis of the issue occurred in *Washington*, where the Third Circuit considered the issue in the context of a double jeopardy claim and ultimately concluded no such power existed. 549 F.3d at 911. In so holding, the Third Circuit explicitly disagreed with the Seventh Circuit, which has held the opposite. *United States v. Bishop*, 774 F.2d 771 (1985). Here, it was the Sixth Circuit's assumption that Petitioner was pressing an "independent" fraud on the court claim that allowed it to cast Petitioner's arguments as beyond its interlocutory jurisdiction.

There is no Federal Rule of Criminal Procedure that offers defendants a way to redress a fraud upon the court, nor any circuit precedent that dictates the proper procedure to seek relief. This case provides an ideal vehicle for the Court to clarify whether an independent cause of action to address fraud upon the court exists in criminal cases and whether a double jeopardy appeal can encompass such allegations. It also provides a much-needed opportunity to address federal prosecutors' obligations towards the tribunal, the impropriety of their weaponizing clear errors of law, and the expectation that they serve as advocates for justice, not lawyers with a win-at-all-costs mentality.

Respondent's argument that this is not an appropriate vehicle for review because of waiver concerns is unfounded. Respondent claims Petitioner waived his right to invoke the Double Jeopardy Clause but does so by mischaracterizing the relief he sought at earlier stages of this case. While Petitioner requested a new trial based on the trial-level *Brady* violation, he never argued that a new trial would sufficiently remedy the prosecutors' fraud on the Sixth Circuit.

Respondent insists that a defendant who secures a new trial based on a *Brady* violation cannot later complain about "the consequences of [a] voluntary choice," *see United States v. Scott*, 437 U.S. 82, 99 (1978). But his was a Hobson's choice. Had the government not presented misleading arguments to the Sixth Circuit during its appeal in *Paulus I*, Petitioner would have been protected by his acquittal and never would have needed to seek a new trial. To penalize him for doing so would reward the government's misdeeds. It also would contradict the reasoning of *Burks v. United States*, 437 U.S. 1, 18 (1978), which held that a defendant's legal entitlement to an acquittal is not waived by virtue of a new trial motion.

In *Burks*, the petitioner unsuccessfully moved for acquittal at the close of evidence. After the jury convicted him, he sought a new trial, which also was denied. On appeal, the Sixth Circuit held that the government's trial evidence had been insufficient but remanded to the district court to determine whether a new trial should be ordered, as the petitioner had requested, or an acquittal entered. The Court reversed, holding that a second trial would constitute double jeopardy and explaining that "it makes no difference that a defendant has sought a new trial as

one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." *Id.* at 17. The Court concluded that since the petitioner was entitled to an acquittal based on the appellate court's ruling that the evidence was insufficient, the only just outcome was to grant the acquittal and corresponding double jeopardy protection, even though he had only sought a new trial.

Here, the Sixth Circuit did not find that the government's evidence was insufficient. But the trial court *did* so find, and the government engaged in improper tactics to secure reversal of that decision. The appellate review of the acquittal being tainted, *see infra*, the only just outcome is to permit Petitioner to rely upon the acquittal as he did before the government's appeal. Under *Burks*, the fact that he sought a new trial after that acquittal was stolen from him is irrelevant.

III. THE DECISION BELOW WAS WRONG

The Sixth Circuit erred in holding that it lacked jurisdiction to review Petitioner's allegations of fraud upon the court, which were part of the double jeopardy claim, under the collateral order doctrine. The Court held in *Richardson*, 468 U.S. at 321, that the collateral order doctrine permits a "canvassing of the record" to evaluate such facts. Respondent has not articulated why the refusal to do so here was proper.

The government cites *Midland Asphalt Corp. v. United States,* 489 U.S. 794 (1989) and *United States v. Hollywood Motor Car Co.,* 458 U.S. 263 (1982), but neither narrows the operative holding of *Richardson*. *Midland*

Asphalt held that the denial of a motion to dismiss based on a violation of grand jury secrecy rules was not immediately appealable because, unlike the prohibition against double jeopardy, Criminal Rule 6(e) is a rule the violation of which would simply require reversal, not a "constitutional guarantee that trial will not occur" in certain circumstances. 489 U.S. at 799-801. The opinion was silent on the breadth of immediately appealable double jeopardy decisions. *Hollywood Motor Car* held that a due process claim based on prosecutorial vindictiveness is not reviewable under the collateral order doctrine because the right to due process – as opposed to the double jeopardy rule – is not "one that must be upheld prior to trial if it is to be enjoyed at all." 458 U.S. at 270. *Hollywood Motor Car* likewise said nothing about the scope of a double jeopardy appeal.[1]

The Sixth Circuit's determination that the fraud upon the court allegations constituted a distinct claim – which undergirded its jurisdictional determination – likewise was unsupported by precedent. *See supra*.

Because of these errors, the Sixth Circuit never analyzed the government's conduct under the fraud upon the court standard. This allowed the prosecutors to benefit from their misconduct and prevented Petitioner from vindicating his double jeopardy rights.

---

1. *Hollywood Motor Car* was a summary per curiam reversal and the subject of a vigorous dissent penned by Justice Blackmun and joined by Justices Brennan and Marshall. 458 U.S. at 271-75.

IV. PETITIONER IS ENTITLED TO RELIEF

By focusing on the government's conduct at trial, Respondent attempts to minimize two essential facts: (1) Petitioner was acquitted by the district court, which afforded him special protections under double jeopardy law; and (2) the prosecutors made affirmative arguments on appeal that they knew were contradicted by the unlawfully withheld evidence.

1. The record shows that the prosecutors committed a fraud upon the court when they appeared before the Sixth Circuit in *Paulus I*. Respondent maintains that Petitioner "cites no authority that would impose an ethical or other requirement on the government, when defending a jury's verdict against a district court's finding that the trial evidence was insufficient, to advise the appellate court of potential claims of error *outside* the trial record that the defendant might raise in a later appeal as grounds for a new trial if the verdict is reinstated." Opp. at 27.

It is remarkable that the Solicitor General – who, it is now apparent, was never told about these issues before granting the government approval to appeal Petitioner's acquittal – condones the prosecutors' participation in an *ex parte* evidentiary hearing that violated Petitioner's Sixth Amendment right to counsel, reliance on a patently erroneous evidentiary ruling, and affirmative decision to make misleading and unsupportable arguments to the appellate court. The appellate judges who heard *Paulus I* and *II* certainly did not condone the conduct and made that clear at oral argument. Petitioner has cited numerous ethical rules and cases confirming that prosecutors have an inviolate duty of candor to the courts. Furthermore, it

is one thing to argue the government was not obligated to disclose the letter to the Sixth Circuit given that it was not part of the evidentiary record being reviewed in *Paulus I*, but another thing entirely to argue that prosecutors are untethered from the prohibition against misleading the tribunal. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("It is as much [a 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.").

Respondent also mischaracterizes the impact of the government's prevarication. Opp. at 21 ("[N]ondisclosure of the *Brady* issue during *Paulus I* did not mislead the court into reversing a judgment of acquittal that it otherwise would have affirmed."). If the government had disclosed the exculpatory information during the first appeal, the evidence under review would not have changed, but the prosecutors would have been prevented from making fraudulent pattern arguments. This change certainly would have impacted the Sixth Circuit's analysis, particularly because sufficiency was a close call. *See Paulus I*, 894 F.3d at 276 (stating it would not have been unreasonable for the jury to acquit Petitioner on the evidence presented). In *Paulus II*, the Sixth Circuit acknowledged it did not have a crystal ball and could not determine exactly how *Paulus I* would have unfolded in that alternate scenario. But that is not tantamount to a ruling that disclosure would have had zero impact.

To establish a fraud upon the court, a litigant must only show that the opposing counsel's actions subverted the judicial process. *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1993). Such evidence is abundant on this record. *See* Tr., R.424-1/PageID#14667-14668 (statement

of Judge McKeague that the withheld 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"). Nothing more is required.

2. The government's fraud upon the Sixth Circuit harmed Petitioner. Respondent argues that even if the government had disclosed the exculpatory information during *Paulus I*, the remedy for the *Brady* violation would have been a new trial, not an acquittal that would bar retrial. Opp. at 28. In support, Respondent cites cases holding that the remedy for a *Brady* violation is a new trial. That is true as far as it goes, but none of the cited cases involve a defendant who was acquitted by the district court.

In the hypothetical scenario posed by Respondent, the relevant question is not what the Sixth Circuit would have done in a run-of-the-mill appeal by a defendant who was convicted in the court below and pressed the existence of a trial error, but what it would have done in the case of an *already acquitted* defendant who faced a government appeal in which the only permissible relief was reinstatement of the jury verdict. *United States v. Wilson*, 420 U.S. 332, 344-45 (1975). If the *Brady* violation had been revealed during the government's appeal, reinstatement of the verdict in any meaningful sense would have been improper. The government would not have been entitled to any relief, because allowing the case to continue would have violated the longstanding rules that the government cannot secure a new trial via appeal and a defendant cannot be retried following acquittal. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1977). The government should not be

able to side-step that outcome because it withheld the exculpatory information until after its fraud resulted in reinstatement of Petitioner's conviction and he was forced to seek a new trial.

3. A second trial would constitute double jeopardy. The prosecutors in Petitioner's case actively misled the tribunal during *Paulus I*. The only fair outcome is to restore the parties to the positions they occupied before the fraud occurred. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 250-51 (1944), overruled on other grounds, *Standard Oil Co. v. United States*, 429 U.S. 17 (1976). Forcing Petitioner to stand trial again despite his acquittal would violate the Double Jeopardy Clause.

CONCLUSION

The petition should be granted.

Dated: April 4, 2022

Respectfully submitted,

C. David Mussetter
Mussetter Law Office
P.O. Box 192
2709 Louisa Road #1
Catlettsburg, KY 41129
(606) 931-0050

Robert S. Bennett
Counsel of Record
Hilary H. LoCicero
Peggy G. Bennett
Bennett LoCicero
& Liu LLP
1707 L Street NW, Suite 1030
Washington, DC 20036
(202) 880-2129
rsbennett@bllfirm.com

Counsel for Petitioner