Nos. 19-13838, 19-14874

In the United States Court of Appeals

for the Eleventh Circuit

United States of America,

Appellee,

v.

Philip Esformes,

Appellant.

On appeal from the U.S. District Court for the Southern District of Florida

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Brief of the National Association of Criminal Defense Lawyers as *Amicus Curiae* for Appellant, Urging Reversal

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Corporate Disclosure Statement

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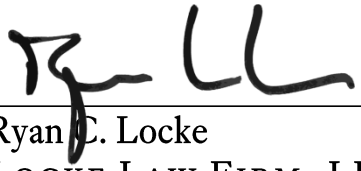
Counsel for NACDL certifies that, to his knowledge, the Certificate of Interested Persons filed with Mr. Esformes's brief is a complete list of all interested persons, with these additions:

- Locke, Ryan C. (counsel for *amicus curiae*)
- Locke Law Firm, LLC (counsel for *amicus curiae*)
- Palchak, Jo Ann (Amicus Committee, NACDL)
- National Association of Criminal Defense Lawyers (*amicus curiae*)

To counsel's knowledge, no publicly traded company or corporation has any interest in the outcome.

DATED September 11, 2020.



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Statement of Amicus Curiae's Identity, Interest, and Source of Authority to File

The National Association of Criminal Defense Lawyers is a voluntary, not-for-profit bar association. Its many thousands of members include private-sector criminal defense attorneys, public defense attorneys, military defense counsel, law professors, and judges. Since its founding in 1958, NACDL has worked to ensure the proper, efficient, and fair administration of justice for those accused of crime or misconduct. NACDL files dozens of *amicus* briefs each year in state and federal courts to voice its position on issues important to criminal defendants, criminal defense attorneys, and the criminal justice system.

The issue presented here is one of nationwide importance. NACDL has a particular interest in ensuring that prosecutorial misconduct is addressed and deterred through corrective action.

No counsel for a party wrote any portion of this brief, in whole or in part. Further, no counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, and its counsel made such a contribution.

All parties consent to the filing of this brief.

Statement of the Issue

Should this Court treat prosecutorial misconduct as a structural error and presume that prosecutorial misconduct is harmful to the entire proceeding?

Summary of the Argument

This Court should categorize prosecutorial misconduct as a structural error. Like prosecution by a self-interested prosecutor, denial of a public trial, denial of the defendant's counsel of choice, and other errors not subject to a harmless error analysis, prosecutorial misconduct creates a harm hard to assess and demeans the judicial process. Similar to structural errors, prosecutorial misconduct requires the court to engage in unguided speculation to discern the harm to the defendant. It is pervasive and far-reaching. Much like the structural error of self-interested prosecution, a prosecutor can obscure misconduct behind broad investigation and charging. The misconduct can drive the investigation, the charge and even the record itself. As a result, prosecutorial misconduct may create a harm yet evade a harmless error review. Beyond this, the violation of the right to be free of a prosecution

tainted by misconduct, like a violation of the Sixth Amendment right to represent oneself, is not amenable to a harmless error analysis because the right is either respected or denied; its deprivation cannot be harmless. Finally, like violating the right to a public trial, violating the right to a fair prosecutor implicates interests beyond those of the defendant alone. The right to a prosecution free of misconduct implicates larger social interests in the integrity and legitimacy of the judicial process and the executive branch's exercise of power in the name of the citizenry. Given these broad social interests, a harmless error analysis limited to the effect on the defendant's interests alone fails to adequately address all rights and interests implicated.

This case highlights the danger of unchecked prosecutorial misconduct. The magistrate judge determined that the prosecutors engaged in improper conduct through their repeated disregard for the attorney-client and work-product privileges. The misconduct continued when, once observed, the prosecutors sought to muddle the evidentiary record over nine days of testimony. Following the magistrate's findings, the prosecutors retained personal lawyers who advocated that the reviewing district court remove the misconduct

finding. The district court, without additional evidentiary hearings, rejected the magistrate court's prosecutorial misconduct findings. Such behavior by prosecutors invites cynicism about justice in America.

When prosecutorial misconduct is obviously illegal or forms a pattern of unlawful behavior it offends the Due Process clause and the appropriate remedy is dismissal of the criminal case. In concluding this, courts have recognized that the Due Process Clause contemplates an adversarial system in which state actors abide by legal norms – whether constitutional, statutory, or rule based -- even as they seek conviction. These legal norms not only form the process due a suspect and defendant before, during, and after a trial, but they promote trust in the system by fostering transparency and a fair administration of state power manifest in the prosecution. Prosecutorial misconduct evidenced by a pattern of obviously illegal conduct reveals the failure of the system and the failure of process. As a result, the only effective remedy is dismissal.

The near total absence of civil redress against a prosecutor underscores this point. Dismissal is the appropriate remedy given the seriousness of the constitutional violations and the damage to public

trust that results from incidents of prosecutorial misconduct in cases such as this. The Supreme Court recognizes dismissal as the appropriate remedy for selective prosecution precisely because it represents an equally dire violation of the Due Process Clause.

Mere reversal is an insufficient remedy as it imposes collective sanctions on courts, prosecutors' offices, the government, and the defendant, all of whom face the possibility of retrial because of the reversal. This not only burdens innocent actors such as judges and non-implicated prosecutors, but also the defendant who must suffer retrial because of having suffered a due process denial in the first trial. In short, retrial creates a new burden on the defendant who has successfully demonstrated the constitutional violation in the first trial. While retrial may induce innocent yet effected actors to prevent prosecutorial misconduct to avoid remand, no inducements will remedy the harm suffered already. The effects continue to be borne by the defendant who is the subject of the retrial. Such incentives may also exist in dismissal. Prosecutors' offices and judges alike may be loath to risk the dismissal of a case and act to curb misconduct before it occurs or harms the defendant. So while remand may create incentives to prevent

misconduct, these incentives are no greater than those produced by dismissal, and retrial carries additional burdens on the already aggrieved defendant who did not play a role in the prosecutor's misconduct. Chief judges could formulate local rules or other internal practices to end illegal conduct; chief prosecutors could spend more money and time training new prosecutors and remove those who display a persistent disregard for the law.

Here the prosecutorial misconduct formed a pattern of obviously illegal conduct. This Court should reverse the district court's order on the Government's and Defendant's objections to the magistrate's report and recommendation, docket entry 975, and vacate Mr. Esformes' conviction.

Argument

Prosecutors are the preeminent actor in the criminal justice system. They have enormous authority in every phase of a criminal case, from the beginnings of an investigation through the sentencing of a defendant after conviction. Their authority comes from the discretion the criminal justice system vests in prosecutors to decide whether to

initiate an investigation, which charges to file, when to file the charges, and whether to offer a plea bargain or request leniency. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). This power, however, is not absolute. The prosecutor bears a duty "to refrain from improper methods calculated to produce a wrongful conviction [even] as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935).

This obligation to refrain from "improper methods" is part of the prosecutor's duty to seek justice over convictions or punishment and embodies the recognition that prosecutors owe a duty not only to an alleged victim but also to larger social interests in fair and legitimate process. Despite these obligations, since *Berger*, courts have extended the harmless error rule to prosecutorial misconduct. This extension follows a judicial trend to require a demonstration by a defendant that the alleged misconduct or constitutional violation produced a sufficient harm to justify remedy. The result of this reliance on the harmless error rule has been an explosion of discussions of harmless error in criminal cases. Such examinations have increased tenfold from the ten-year period leading to 1975 to the ten-year period leading to 2019, which is

three times the pace of new federal criminal filings. *See* Christopher Slobogin, *The Case for a Federal Criminal Court System (and Sentencing Reform)*, 108 Calif. L. Rev. 101, 111 (2020). In the context of prosecutorial misconduct, application of the harmless error rule has led to appellate courts permitting constitutional violations without a remedy. This may have the unintended consequence of emboldening an apparently rogue prosecutor to evade accountability. In the process, reliance on harmless error diminishes such prosecutors' incentives to comply with legal norms, impairs the ability of reviewing courts to deter error, and denies defendants redress for the violations they've suffered.

The National Association of Criminal Defense Lawyers urges this Court to treat prosecutorial misconduct like a structural error by presuming the prejudicial effect of the misconduct. Like other structural errors—such as a complete denial of counsel, a biased trial judge, denial of a public trial, a defective reasonable doubt instruction, or racial discrimination in the selection of the grand jury—prosecutorial misconduct can and often does fatally infect the entire proceeding and may produce harms that evade quantification. Indeed, speculating about how the trial would have unfolded absent this

misconduct is speculative at best because it is difficult if not impossible to assess the effect of prosecutorial misconduct on a defendant or its more invasive effect on the overall integrity of the system. Plainly put, just because the degradation of the defendant's rights or the public's ability to trust the prosecutor that results from misconduct is difficult to quantify does not mean that it either does not exist or should not be remedied. In fact, the difficulty to prove the full global effect of the misconduct suggests that the reliance on harmless error analysis to assess a remedy for prosecutorial misconduct is itself an error.

The Amici do not suggest that every instance of prosecutorial misconduct should cause a dismissal. Instead, the remedy should turn not on the evidence of the harm caused but on the nature and pervasiveness of the misconduct itself. An appellate court confronted with prosecutorial misconduct is able to consider when such conduct constituted an obviously illegal activity or forms a pattern of unlawful behavior that warrants dismissal to deter future misconduct and stimulate group-based self-regulation.

I. There are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.

The harmless error doctrine prevents a reversal for a trivial error that did not affect the trial's accuracy. Some errors, however are exempted from harmless error analysis because identifying the effect of the errors is impossible.

Before 1967, courts generally agreed that constitutional errors could never be harmless. The text of Rule 52 and the United States Code both distinguish trivial error from error affecting the "substantial rights" of the defendant. Fed. R. Crim. P. 52(a) ("any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."). In *Chapman v. California* the Court rejected the per se exclusion of constitutional errors from harmless error analysis, declaring that constitutional errors could be harmless and holding that "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Despite the

Court's rejection of the blanket exclusion in *Chapman*, the Court noted there are "some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. 18, 23-24 (1967). In 1991, the Court described errors concerning these basic fair trial rights as "structural error." *Arizona v. Fulminante*, 499 U.S. 279, 280 (1991).

Courts have used "structural error" in two ways: To refer to error that "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself" and to refer to any error that cannot be reviewed under a harmless error standard. *Compare, e.g.*, *United States v. Soto*, 519 F.3d 927, 930 (9th Cir. 2008) ("We hold that a failure to give a Carter instruction is not a structural error, because it does not "affect the framework within which the trial proceeds.") *with, e.g., United States v. Navarro*, 608 F.3d 529, 538 (9th Cir. 2010) ("'Structural error' is a term of art for error requiring reversal regardless of whether it is prejudicial or harmless…") *and United States v. Brandao*, 539 F.3d 44, 58 (1st Cir. 2008) (defining structural errors as "constitutional errors that deprive the defendant of

a fundamentally fair trial and thus may not be found harmless under Rule 52(a)'s harmless error standard").

Under either definition, the usual harmless error analysis—looking at all the evidence and assessing the impact of the error on the outcome of the trial—fails to answer what remedy is appropriate. Because structural errors implicate the framework and fundamental process of the trial, an analysis of the quantity or quality of the evidence, as harmless error analysis attempts, is insufficient and may overlook or minimize the harm suffered which cannot be readily quantified or measured. Put another way, courts may have real trouble assessing the effect of the structural error and whether reversal is required because of that error. This is because to do so requires speculation about how the trial would have unfolded. The error, however, may not have affected the outcome, but may have so fundamentally curtailed the defendant's rights or trial processes that it requires reversal all the same.

For these reasons, prosecutorial misconduct as evidenced here must be treated as structural error.

A. Because courts cannot accurately assess the prejudice caused by prosecutorial misconduct the harmless error standard is inappropriate

Assessing an error always involves some speculation. For some errors, however, that speculative assessment occurs within an established framework. For example, if a piece of evidence is wrongfully admitted, the reviewing court examines the error by considering the weight of the evidence and the strength of the case overall.

In contrast, structural errors, by their nature, lack a meaningful assessment framework and so require unguided speculation about their impact on the trial. These errors impact the *very function* of the trial and core of its process, rendering calculation of their impact impossible. Time and time again the Court has rejected the use of the harmless error analysis for these structural errors, acknowledging that the standard fails to consider errors so fundamental they cannot be quantified.

Consider a trial by a biased judge. A biased judge so fundamentally taints the trial process that the tribunal can never be fair "no matter what the evidence was against [the defendant]." *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). *Chapman*, 286 U.S. at 23 n. 8,

Fulminante, 499 U.S. at 310. This type of error defies assessment of the effect of the error. The judge's bias renders every action suspect and every outcome potentially different. This inability to quantify the effect of the error demands that the appellate court must assume prejudice.

The denial of defendant's counsel of choice raises similar concerns about omnipresent and so incalculable harm.. In *United States v. Gonzalez-Lopez,* the Court noted:

> It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe. 548 U.S. 140, 150 (2006).

Likewise, a courtroom closure can never be harmless error because "while the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real"; yet it is nearly impossible to establish how

spectators deter perjury, curbs judicial abuse, or advances the cause of republican self-government. *Waller v. Georgia*, 467 U.S. 39, 49 n. 9 (1984).

Still a fourth example of a structural error is the appointment of an attorney who possesses a conflict of interest with his client. Assessment of the effect of such an advocate's performance at trial requires an unacceptable degree of "unguided speculation" as to the harm the defendant might have suffered. *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978).

A self-interested prosecutor presents the same dilemma. Because a prosecutor's decisions "shape the record" the effect of a self-interested prosecutor is pervasive. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987). A self-interested prosecutor can use his broad power and discretion to shape the investigation, prosecution, sentencing, and appeal to benefit himself personally, financially, or politically. In *United States v. Spiker*, the court assumed prejudice, finding plain error to allow a prosecutor to continue to serve in a case against a defendant who tried to murder him with a metal spike in court. 649 Fed. Appx. 770, 771-72 (2016). In *Spiker*, this Court found

that the prosecutor's self-interest in the outcome of the trial so affected the defendant's rights that it was impossible to quantify the "far-reaching" effect. *Id.* at 774.

The nature of the prosecutorial misconduct alleged here establishes the same pervasiveness to render it a structural error. The misconduct alleged represents a violation of the prosecutor's sworn duty "to seek justice." As a result, as noted by the Magistrate, the effect of the misconduct cannot be measured merely on the strength of the evidence against the accused. In short, so pervasive is the misconduct that harmless error is an inadequate calculus. Instead, the prosecutors' conduct here is analogous to self-interested prosecutors both in terms of its pervasive reach and in terms of the incalculability of its effects on the case.

For the court to attempt to determine the effect of prosecutorial misconduct here it must engage in unguided speculation. For example, how does a prosecutor's knowledge and possession of privileged materials (including attorney work product) unfairly advantage the prosecution? Would a Magistrate have signed a warrant if she knew it was for an attorney's office of an accused—leading to the breach of the

attorney-client privilege? How does an alleged failure to timely produce files involving attorney-client material impact the accused trial strategy? Is it a fair proceeding when the prosecution improperly learns the defense strategy and allegedly uses the information to prepare its witnesses? And so on.

Each question, each consideration of the various and repeated acts of prosecutorial misconduct, requires the court to engage in unguided speculation. Only then will the Court discern the harm that is pervasive and far-reaching shaping the very record of the trial itself. Given the extent of this misconduct, the multitude of effects and results it might have produced, the fundamental fairness of this trial was undermined. This court should treat this level of misconduct as a structural error, jettison harmless error analysis, and presume prejudice.[1]

[1] The Fifth Circuit has done just this, although under a different analytical framework. *United States v. Bowen,* 799 F.3d 336, 340 (5th Cir. 2015) (granting a new trial because the "extraordinary case" of prosecutorial misconduct was such that "harmless error cannot even be evaluated because the full consequences of the federal prosecutors' misconduct remain uncertain" and "the trial … was permeated by the cumulative effect of the additional irregularities found by the district court" and relying on footnote nine of *Brecht v. Abrahamson*, which reserves the possibility that a new trial can in some egregious

B. This Court should presume prejudice because prosecutorial misconduct demeans the judicial process.

Even if this court were to decline to conclude that the prosecutor's misconduct here constituted structural error, or that the errors would not have altered the outcome of the trial, the court should none-the-less presume prejudice as the misconduct implicates more important values. The Supreme Court has repeatedly acknowledged this reality. In considering the right to self-representation, the Court concluded that denial of this right is "not amenable to a harmless error analysis. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8 (1984); *Faretta v. California*, 422 U.S. 806 (1975). The harm of denying the defendant the right to represent himself implicates the defendant's dignitary interest in representing himself and courts presume prejudice to protect that right.

The Court reached a similar conclusion when assessing the right to a public trial. A public trial not only insulates the defendant from

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circumstances be mandated for "hybrid" trial/structural errors even without a showing of prejudice to the defendants. 507 U.S. 619, 638 n. 9, (1993).).

abuses that may be obscured by a private proceeding, but may also protect social interests in transparency and the integrity of the judicial process. Thus, harmless error analysis of the denial of the right to public trial disregards the extent of the harm suffered and fails to protect the interests of all the stakeholders. In *Waller*, the Court noted "the harmless error rule is no way to gauge the…societal loss that flows from closing courthouse doors." 467 U.S. at 49 n. 9.

Likewise, prosecutorial self-interest may implicate interests beyond the defendant's alone. The *Spiker* Court found that the error of allowing an interested prosecutor to serve in the case undermined public confidence in the proceeding and created an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general. 649 Fed. Appx. at 771-72. A self-interested prosecutor may seek to minimize misconduct allegations to protect the prosecution teams' careers and reputations.

Pervasive and repeated prosecutorial misconduct as occurred here implicates larger social interests in fair process. The government's repeated improper conduct including their disregard for the attorney-client and work-product privileges, their effort to impact the

evidentiary record upon discovery, and their decision to hire private attorneys to defend their work and protect their professional reputations even at a cost of an accurate record before the district court, all raise concerns not only about whether confidence in the outcome of the trial is undermined, but also about fairness of the overall process and the integrity of the prosecutor's officer generally. Magistrate order at 114.

The misconduct implicates not only the personal interests of the defendant but the larger interests of society in a fair and just criminal process. In this, the harmless error analysis fails to capture the harms that extend beyond the individual defendant's trial. To avoid this failure, the court should presume prejudice. Indeed, such a pattern of prosecutorial misconduct inculcates cynicism in our justice system.

II. Dismissal is the appropriate remedy for pervasive prosecutorial misconduct.

Dismissal is the appropriate remedy for prosecutorial misconduct that was obviously illegal or forms a pattern of unlawful behavior. A pattern of obviously illegal conduct by the prosecutor is

strong evidence that the procedural rules and other safeguards are not being taken sufficiently seriously and a warning sign that the existing accountability regime is too feeble to hold the illegal behavior in check. Dismissal is the only effective judicial means to punish such prosecutorial misconduct.

Restricting a reviewing court to a harmless error analysis in the face of prosecutorial misconduct allows a court to acknowledge or observe the misconduct, but renders it unable to provide a meaningful remedy absent quantifiable harm. Without quantifiable harm, a reviewing court may find that prosecutorial misconduct has occurred but still may affirm the conviction. When this occurs, there is no direct constitutional remedy available to address prosecutorial misconduct. Instead, such misconduct both occurs and yet evades remedy given the amorphous implications for the defendant's and larger social interests.

For the defendant, there is virtually no remedy for prosecutorial misconduct outside the criminal case because of the nearly complete unavailability of civil redress against a prosecutor. *See* Anthony Meier, Note, Prosecutorial Immunity: Can 1983 Provide an Effective Deterrent to Prosecutorial Misconduct? 30 Ariz. St. L.J. 1167, 1168

(1998); *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (holding prosecutors have absolute immunity under § 1983); *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967) (holding district attorneys' offices cannot be sued based on ordinary principles of vicarious liability). And the Supreme Court has held that federal courts cannot use their supervisory power to dismiss indictments after finding prosecutorial misconduct. *See* Bruce A. Green, *Federal Courts' Supervisory Authority in Federal Criminal Cases: The Warren Court Revolution That Might Have Been*, 49 Stetson L. Rev. 241, 258-61 (2020). In *Bank of Nova Scotia v. United States*, the trial court relied on its supervisory powers to dismiss an indictment after finding that prosecutors had committed many errors during grand jury proceedings. 487 U.S. 250, 253-54 (1988). The Supreme Court held that dismissal was improper absent showing prejudice because Rule 52 is "as binding as any statute duly enacted by Congress" and thus the "balance struck by the Rule between society costs and the rights of the accused may not casually be overlooked because a court has elected to analyze the question under the supervisory power." *Id.* at 254-55.

The remedy of dismissal serves not only to deter prosecutorial misconduct but it signals the significance of the misconduct and the implications for both the defendant's and larger social interests.

In the context of vindictive prosecution, the Supreme Court has determined that such a remedy is appropriate to vindicate offended constitutional interests. *Thigpen v. Roberts,* 468 U.S. 27 (1984)*; Blackledge v.* Perry, 417 U.S. 21 (1974). Likewise, the Court has upheld dismissal as an appropriate remedy for the Due Process violations that resulted from a selective prosecution. *United States v. Armstrong*, 517 U.S. 456, 463 (1996) ("…[a] selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution."). Prosecutorial misconduct also violates the Due Process Clause, and thus even as a dismissal benefits the defendant it also vindicates constitutional offenses. *Caplin & Drysdale v. United States*, 491 U.S. 617, 633 (1989) (holding a due process claim for forfeiture is cognizable only for prosecutorial misconduct).

In his dissent to his colleagues' decision to affirm a criminal conviction despite prosecutorial misconduct in *United States v. Antonelli Fireworks Co.*, Judge Jerome Frank sensed a troubling pattern was emerging. 155 F.2d 631 (2d Cir. 1946) (Frank, J., dissenting). In a string of opinions, the Second Circuit had "used vigorous language in denouncing government counsel" for misconduct, but each time it affirmed the conviction, relying on the harmless error rule. *Id.* at 656-57, 661.

Judge Frank warned that "the practice of this court—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary." *Id.* at 661. State courts have felt the same harmless error cynicism for some time. *See, e.g.*, *People v. Black*, 238 P. 374, 387 (Cal. Ct. App. 1925) ("It seems evidence that the prosecutors of the state, and possible that the trial judges, are conducting criminal cases with an eye to the saving grace of the [state constitution's harmless error provision]"); *Jones v. State*, 735 P.2d 699, 703 (Wyo. 1987) (Urbigkit, J., dissenting) ("Prosecutorial overreaching will only be discontinued when the detriment in case reversals exceeds the benefit in excused convictions. The evidentiary

tactic of using bad-acts and bad-actor evidence for proof of guilt has continued unreasonably, despite adverse comment by this court. The 'do better next time' admonition seldom deters future conduct."); *State v. Rodriguez*, 254 S.W.3d 361, 373 (Tenn. 2008) ("[W]hen the rules of evidence and procedure stand unenforced through a finding of harmless error, there is no deterrence that would encourage future adherence to the rule. The absence of deterrence may 'tacitly inform[] prosecutors that that they can weigh the commission of evidentiary or procedural violations…against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant's guilty.'") (footnote omitted) (second and third alterations added in *Rodriguez*) (quoting Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 425 (1992)); *United States v. Pallais*, 921 F.2d 684, 691-92 (7th Cir. 1990) (Posner, J.) ("[Our] rebukes seem to have little effect, no doubt because of the harmless error rule, which in this as in many other cases precludes an effective remedy for prosecutorial misconduct"). At least one appellate prosecutor has even openly admitted that the court's liberal use of the harmless error rule was influencing the behavior of trial prosecutors,

prompting stern words from the court—followed by another affirmance on harmless error grounds. *State v. Neidigh*, 895 P.2d 423, 427-29 (Wash. Ct. App. 1995).

Judge Frank thought a reversal in *Antonelli Fireworks* would serve as a deterrent and make the prosecutor "subsequently live up to professional standards of courtroom decency." Judge Frank warned that if the court continued to "merely go through the form of expressing displeasure" without penalizing the offending prosecutors by "depriving them of their victories," its condemnations would accomplish little, for "[g]overnment counsel, employing such tactics, are the kid who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking." *Antonelli Fireworks,* 155 F.2d. at 661-62. A reversal would increase the low costs borne by prosecutors for their misconduct to a level that would likely serve as a deterrent.

Reversal also imposes collective sanctions as it recognizes the disutility a dismissal because of prosecutorial misconduct creates for courts, prosecutors' offices, and for the government as a whole. This recognition may in turn stimulate group-based self-regulation and push prosecutors to act within the bounds of the law. *See* Daryl J. Levinson,

Collective Sanctions, 56 Stan. L. Rev. 345, 376-77 (2003). Recognizing the value of collective sanctions undermines the perception that collective sanctions fail in their purpose because they are borne by people other than the wrongdoer. *See, e.g.*, *United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981) (per curiam) ("Reversal is an ill-suited remedy for prosecutorial misconduct; it does not affect the prosecutor directly, but imposes upon society the cost of retrying an individual who was fairly convicted."). Instead, collective sanctions induce groups to generate their own mechanisms for preventing or sanctioning prosecutorial misconduct. A realistic prospect of reversal for prosecutorial misconduct could spur chief judges to formulate local rules or other internal practices aimed at rooting out recurring forms of illegal conduct. Chief prosecutors may allocate additional resources toward training new attorneys about their legal obligations or remove line prosecutors or supervising attorneys who have displayed a persistent disregard for the law.

The case before this Court is an exemplar for prosecutorial misconduct that formed a pattern of obviously improper conduct. After nine days of evidentiary hearings, the Magistrate determined that

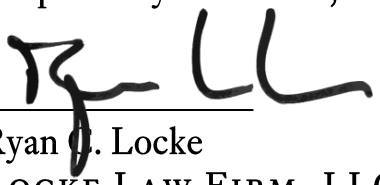
prosecutors disregarded the attorney-client and work-product privileges, tried to garble the evidentiary record, and provided facially inconsistent and an incredible explanation for its handling of privileged documents. The three-year long pattern of misconduct and repeated violations of attorney-client privilege were so pervasive and prejudicial that dismissal of the indictment is warranted.

Conclusion

The district court's order in docket entry 975 should be reversed and Mr. Esformes's conviction should be vacated.

DATED September 11, 2020

Respectfully submitted,



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Certification of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,069 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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Ryan C. Locke

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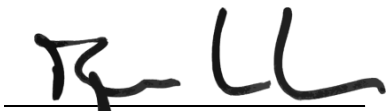
I certify that on September 11, 2020, this brief was filed and served on all parties by ECF, and seven paper copies were mailed to the Clerk of the Court by overnight Federal Express.



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